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No. 429

In the Supreme Court of the United States

OCTOBER TERM, 1964

ASHTON J. MOUTON, COLLECTOR OF REVENUE
STATE OF LOUISIANA,
Petitioner,

v.

INTERNATIONAL SHOE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, the Collector of Revenue of the State of Louisiana, prays that a writ of certiorari be issued, to review the final judgment of the Supreme Court of the State of Louisiana, which affirmed the judgment of the Nineteenth Judicial District Court of the State of Louisiana. *International Shoe Co. v. Cocreham* 164 So. 2d 314 (1964). The decisions of both Louisiana Courts were in favor of International Shoe Company, respondent herein, and rejected petitioner's contention that Public Law 86-272 (73 Stat. 555; 15 USCA 381) is unconstitutional.

CITATIONS TO OPINIONS BELOW

The opinion of the trial court (19th Judicial District Court) is unreported, but appears on pages 29-41 of the record of this case, and is printed, together with the judgment of the trial court, as Appendix "A" hereto, infra, p. 54.

The opinion of the Louisiana Supreme Court is reported in 164 So. 2d 314, and appears on pages 52-63 of the record and is printed as Appendix "B" hereto, p. 67.

JURISDICTION

The judgment of the Supreme Court of the State of Louisiana was entered on March 30, 1964. (R. page 52) Rehearing was denied on June 8, 1964 (R. page 71), application therefor having been timely filed on April 13, 1964, (R. page 64).

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257, which provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question, . . . or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States."

QUESTIONS PRESENTED FOR REVIEW

The question presented in this case meets the requirements of Rule 19 of this honorable court suggesting the reasons for which certiorari may be granted. In this case the state courts of Louisiana have decided a federal question of substance which has not previously been determined by the United States Supreme Court. The rulings of the Louisiana courts appear to be contrary to the many holdings by the United States Supreme Court that the commerce clause of the Constitution does not exempt interstate businesses from paying their fair share of the costs of government in the states in which they operate.

The background giving rise to the fundamental question presented in this case is presented so clearly by Justice McCaleb in his opinion for the Louisiana Supreme Court which is appealed from herein that it seems appropriate to quote that portion as a background to the presentation of the question: "The case is one of national importance which involves principally a clash between the right of the several states, acting under their taxing powers, to require that interstate business bear a fair share of the costs of local government in return for benefits received and the power of Congress to regulate the free flow of interstate commerce by prohibiting the states from levying an income tax on persons engaged in interstate commerce whose only connection with the state is the sending of salesmen therein to solicit orders." (R. page 56) (page 71 herein) (164 So.2d 314, 318).

"* * *

"International Shoe Company brought this suit against the Collector of Revenue to recover state income taxes amounting to $6,191.83, which it paid under protest for the fiscal years ending November, 1959, and November, 1960. Plaintiff pleads the provisions of Public Law 86-272 (73 U.S. Stat. 555; 15 U.S.C.A. §381), as a bar to the State's right to collect the income taxes for the years in question.

"Previously, this Court held, under an identical state of facts, that plaintiff was liable for state taxes upon its net income arising from its operations in Louisiana. *International Shoe Company v. Fontenot*, 236 La. 279, 107 So.2d 640, (1958) certiorari denied 359 U.S. 984, 79 S.Ct. 943, 3 L.Ed. 2d 933. That case was a counterpart of *Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La. 651, 101 So.2d 70, (1958) in which the Supreme Court of the United States dismissed an appeal and also denied certiorari. See 359 U.S. 28, 79 S.Ct. 602, 3 L.Ed. 2d 625.

"In February of 1959, the Supreme Court rendered its judgment in the consolidated cases *Northwestern States Portland Cement Company v. Minnesota* and *Williams v. Stockham Valves and Fittings, Inc.*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed. 2d 421, 67 A.L.R. 2d 1292. This decision upheld the contentions of the states of Minnesota and Georgia that a nondiscriminatory properly appointed net income tax could be levied and collected from foreign corporations not authorized to do business in the taxing states whose activities in those states were purely of an interstate character.

The ruling was based upon a determination that the net income derived from the operations of the corporations within the taxing states provided a sufficient connection or 'nexus' with Minnesota and Georgia for taxing purposes. There, each corporation maintained an office in the taxing state from which its salesmen solicited orders from local customers, which orders were transmitted for acceptance outside of the state and, where accepted, were fulfilled by the shipment of tangible goods into the state through the channels of interstate commerce.

"Presumably, on the authority of the Northwestern-Stockham decision, the Supreme Court later denied certiorari in the *Brown-Forman* case and *International Shoe Company v. Fontenot*, although these corporations did not have local offices from which the operations were conducted.

"Subsequent to the denial of certiorari in the Louisiana cases, Congress passed Public Law 86-272." (Record, pages 52-53) (page 67 herein) (164 So.2d 314, 315)

The question may be stated to be:

Does the commerce clause of the United States Constitutional confer upon Congress the power to directly curtail the judicially established sovereign power of the states to tax that which falls within their respective jurisdictions?

Louisiana's argument is in four phases which evidence grounds for the constitutional invalidity of Public Law 86-272.

1. Public Law 86-272 is not a regulation of commerce or business activities but is a regulation of the states' power to tax. It grants an exemption to certain multistate businesses from bearing a fair share of the cost of government in the states in which the business operates.

2. Public Law 86-272 in effect defines what constitutes "nexus" or the minimum requirements to support the taxing jurisdiction of the state. The State of Louisiana urges that what constitutes sufficient connection is a question of fact which under Constitutional Law is peculiarly reserved to the interpretation of the United States Supreme Court in the final analysis.

3. Public Law 86-272 violates the principle of equality of the states.

4. Public Law 86-272 is arbitrary and unreasonable in its application because it draws distinctions without substance and thereby discriminates against other business in meeting the technical definitions required for its application.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions, and statutes involved herein are:

1. The Tenth Amendment to the Constitution of the United States:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States,

are reserved to the States respectively, or to the people.

2. The "Commerce Clause" of the Constitution of the United States, Article I, Sec. 8, (Cl. 1 and 3)

Sec. 8, Clause 1. *Powers of Congress.*

"The Congress shall have Power . . .

Sec. 8; Clause 3.

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

3. The "Supremacy Clause" of the Constitution of the United States, Article VI, Section 2:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

4. The Congressional Act giving rise to the Controversy:

PUBLIC LAW 86-272; 73 STAT. 555
(15 U.S.C.A. 381), Sept. 14, 1959.

An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

TITLE I—Imposition of Minimum Standard

Sec. 101. (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer or such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to—

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) For purposes of this section—

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activity; and

(2) the term "representative" does not include an independent contractor.

Sec. 102. (a) No State, or political subdivision thereof, shall have power to assess, after the date of the enactment of this Act, any net income tax which was

imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 101.

(b) The provisions of subsection (a) shall not be construed—

(1) to invalidate the collection, on or before the date of the enactment of this Act, of any net income tax imposed for a taxable year ending on or before such date, or

(2) to prohibit the collection, after the date of the enactment of this Act, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

Sec. 103. For purposes of this title, the term "net income tax" means any tax imposed on, or measured by, net income.

Sec. 104. If any provision of this title or the application of such provision to any person or circumstance is held invalid, the remainder of this title or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

TITLE II—Study and Report by Congressional Committees

Sec. 201. The Committee on the Judiciary of the House of Representatives and the Committee on Finance of the United States Senate, acting separately

or jointly, or both, or any duly authorized subcommittees thereof, shall make full and complete studies of all matters pertaining to the taxation by the States of income derived within the States from the conduct of business activities which are exclusively in furtherance of interstate commerce or which are a part of interstate commerce, for the purpose of recommending to the Congress proposed legislation providing uniform standards to be observed by the States in imposing income taxes on income so derived.

Sec. 302. The Committees shall report to their respective Houses the results of such studies together with their proposals for legislation on or before July 1, 1962.*

Approved September 14, 1959.

5. The Louisiana Income Tax laws here at issue are appended hereto as Appendix "C" and are contained in the Louisiana Revised Statutes of 1950.

6. A constitutional principle not expressed in any particular clause of the Constitution itself but which has been clearly established by the United States Supreme Court is that the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized.

"When that equality disappears we may remain a free people, but the Union will not be the Union of

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* By successive amendments, this date has been extended to March 31, 1964.

the Constitution." *(Coyle v. Smith* 221 U.S. 559, 31 S.Ct. 688, 695, 1911)

STATEMENT OF THE CASE

This suit originated in the 19th Judicial District Court of the State of Louisiana as a suit for recovery of Louisiana income taxes in the amount of $6,191.83 paid under protest for the fiscal years ending November 1959 and November 1960. The case was tried upon the petition and the answer without the elicitation of any evidence whatsoever. The facts of this case are identical to those in *International Shoe Company v. Fontenot*, 236 La. 279, 107 So.2d 640 (1959); certiorari denied 359 U.S. 984, 79 S.Ct. 943, 3 L.Ed. 2d 933, (1959) in which the Louisiana Supreme Court held that the operations of International Shoe Company in Louisiana were sufficient to subject it to Louisiana's tax jurisdiction and that the imposition of the Louisiana income tax was proper. After the Louisiana Supreme Court's decision the Congress of the United States enacted Public Law 86-272; 73 U.S. Stat. 555, 15 U.S.C.A. 381. Public Law 86-272 expressly seeks to remove the State's power to tax income earned in the state by corporations having a multi-state operation when the "nexus" of the corporation is the maintenance of a sales force which solicits orders within the state.

The constitutional issues are raised by the petition and answer and are the only issues raised herein. This is suggested in Articles 8, 18 and 19 of the petition (R. pages 7 and 14). The local activity of Inter-

national Shoe Company within Louisiana is set forth in Article 12 of the petition (R. page 10). Article 15 of the petition (R. page 12) sets forth the amount of sales and the commissions paid upon its sales made in Louisiana. In Article 16 of the petition (R. page 12) International Shoe Company specifically pleads the provisions of Public Law 86-272; 73 U.S. Stat. 555, 15 U.S.C.A. 381. In Article 19 of its petition International Shoe Company especially pleads the constitutionality of Public Law 86-272.

The answer of the Collector of Revenue beginning on Page 24 of the Record admits the pertinent allegations of fact. In Articles 21 through 24 of the answer the Collector of Revenue of the State of Louisiana expressly pleads the unconstitutionality of Public Law 86-272 (R. page 27).

No question is presented as to the validity of the imposition of the Louisiana net income in the absence of Public Law 86-272. Louisiana uses a reasonable apportionment formula consisting of the average of three ratios—sales, property and wages.

This action is brought by International Shoe Company against the Collector of Revenue of the State of Louisiana to recover income taxes in the amount of $6,191.83 which was paid under protest for the fiscal years ending November 1959 and November 1960. International Shoe Company is a Delaware corporation with its principle place of business in St. Louis, Missouri.

The activities of International Shoe Company

which bring the corporation within the taxing jurisdiction of the State of Louisiana are as follows:

Fifteen salesmen who are hired and employed by International Shoe Company on a salary and/or commission basis regularly and systematically solicit orders from regular customers and prospective customers who are retail dealers in shoes. In addition to the taking of orders the salesmen display samples of the shoes to the company's customers. For the fiscal year 1959 the fifteen salesmen who regularly and systematically travelled in Louisiana and who solicit orders from retailers in Louisiana obtained orders for shoes in the amount of $5,786,681.59 which were filled from outside of the State. Salaries and commissions paid to the salesmen soliciting in Louisiana totalled $158,207.17. For the fiscal year 1960 the total orders filled in the State of Louisiana by the corporation amounted to $5,858,514.70 for which salaries and commissions amounted to $153,917.69.

For the fiscal year 1959 the net income of the company resulting from the sales of shoes in the State of Louisiana amounted to $68,741.00 for which the Collector of Revenue claims $3,079.60 Louisiana income tax. In the year 1960 International Shoe Company's net income from the sales in Louisiana amounted to $73,401.70 for which $3,112.23 Louisiana income tax is claimed by the Collector of Revenue.

Prior to this action International Shoe Company under an identical set of facts had contested the imposition of the Louisiana net income tax. The Louisiana Supreme Court upheld the tax as being properly

imposed and apportioned. *International Shoe Company v. Fontenot*, 236 La. 279, 107 So.2d 640; certiorari denied 359 U.S. 984, 79 S.Ct. 943, 3 L.Ed. 2d 933. That case was a counterpart of *Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La. 651, 101 So.2d 70, in which the Supreme Court of the United States dismissed an appeal and denied certiorari, 359 U.S. 28, 79 S.Ct. 602, 3 L.Ed. 2d 625.

In February of 1959, the United States Supreme Court rendered its judgment in the consolidated cases, *Northwestern States Portland Cement Company v. Minnesota* and *Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed. 2d 421, 67 A.L.R. 2d 1292. In those cases this Court held a nondiscriminatory, properly apportioned net income tax could be collected from foreign corporations when the activities of those corporations provided a sufficient connection or "nexus" with the taxing state to establish jurisdiction. In the *Northwestern-Stockham* case each corporation maintained an office in the taxing state from which its salesmen solicited orders from local customers which orders were transmitted for acceptance outside the state and were filled by the shipment of the goods through channels of interstate commerce. In those consolidated cases the United States Supreme Court indicated that the existence or non-existence of an office within a state or the acceptance or nonacceptance of orders from within or outside the state were distinction without substance and of no probative value. Since the Northwestern States and Stockham Valves decision the United States Su-

preme Court has had occasion to further clarify the type of connection that gives rise to the state's taxing jurisdiction over a multistate corporation. In *Scripto v. Carson*, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed. 2d 660 (1960) this Court held that the State of Florida may constitutionally require Scripto Inc. to collect the Florida use tax upon items sold in Florida by the corporation. Scripto, Inc. sold and shipped orders from its place of business in Georgia to its customers in Florida. Scripto's Florida operations were conducted through a division called Adgif Company. Adgif did not own, lease or maintain any office, distributing house, warehouse or other place of business in Florida or have any regular employee or agent in Florida. It did not own or maintain any bank account or stock of merchandise in Florida. Orders for its production were solicited by advertising specialty brokers (wholesalers or jobbers) who are residents of Florida. At the time of suit there were ten such brokers who were paid only upon a commission basis. In upholding the tax imposition this Court cited *Miller Bros. v. Maryland*, (1954) 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744, and affirmed the holding herein that some definite link or minimum connection between a state and the person, property or transaction which it seeks to tax is necessary to establish jurisdiction.

The most recent opinion of the United States Supreme Court considering the question of "nexus" is *General Motors Corporation v. Washington* decided June 8, 1964 (not yet reported). General Motors Corporation challenged Washington's tax imposed upon

the privilege of engaging in business activities within the State. General Motors contended that the tax is levied on unapportioned gross receipts from wholesale sales and therefore is a tax on the privilege of engaging in interstate commerce. In upholding the tax as applied to General Motors' operations the Supreme Court concluded that a state may tax gross income derived from wholesale sales of automobiles by the manufacturer to dealers within the state even though the orders are placed and filled from points outside the state. The fact that no salesmen or sales office is maintained within the state does not mean that the taxpayer is not engaged in business within the state.

After the decision in the *Northwestern-Stockham* cases and the denial of appeal in the *International Shoe Company* and *Brown-Forman* cases Congress enacted Public Law 86-272. It was after the Congressional enactment that the decisions in the *Scripto* and the *General Motors* cases were handed down by the United States Supreme Court. Presumably, Public Law 86-272 does not overrule the United States Supreme Court in its decision in the *Northwestern-Stockham* cases but did overrule the results reached in *International Shoe Company* and *Brown-Forman.* While this Court did not hear *International Shoe* and *Brown-Forman,* the results reached in *Scripto* and *General Motors* indicate that *International Shoe* and *Brown-Forman* would have been upheld had they been heard.

With the above as a background it becomes apparent that the Congress of the United States has invaded the most basic and fundamental power of

sovereignty—the right to exact an impost for the purpose of defraying the expenses of government.

This case brings before the Court for its judicial determination the first instance in the history of our nation that Congress, without affirmatively legislating in the field in question, has said to the sovereign states, "You may no longer exercise your sovereign power."

Congress has seen fit to take its action in spite of the many cases of this Honorable Court that expound the proposition that the commerce clause does not relieve those engaged in interstate commerce from paying their fair share of state tax burden even though it increases the costs of doing business. Congress has taken its action in spite of the fact that in order for a state to exercise its sovereign power to tax there must be a "nexus" or localization of the taxpayer within the state.

The District Court of Louisiana and the Supreme Court of Louisiana have seen fit to interpret the commerce clause as giving Congress the power to enact a law which does the very thing that the United States Supreme Court has said the commerce clause was not intended to do.

ARGUMENT

1. Validity Of The Louisiana Income Tax As Applied To International Shoe Company In The Absence Of Public Law 86-272.

Actually there is no serious question presented in this action as to the validity of the imposition of

the Louisiana income tax upon the income earned by International Shoe Company within Louisiana.

The pertinent provisions of Louisiana's income tax law are set forth in Appendix "C" (page 83) of this petition.

It should be noted that the law imposes a four (4%) per cent tax on the net income of foreign corporations earned from sources within Louisiana. (R. S. 47:31, 161 and 241, pages 83, 86 and 87 herein). Income earned within Louisiana is determined by the use of a reasonable apportionment formula computed by the use of a ratio which is the average of three fractions: (R.S. 47:245F, pg. 94)

Louisiana sales to total sales
Louisiana property to total property
Louisiana wages to total wages

This formula is commonly known as a three factor formula or the Massachusetts formula.

This formula has been upheld as reasonably calculated to measure income earned within a state. *(Butler Bros. v. McColgan,* 315 U.S. 501, 62 S.Ct. 701 (1942).

This identical factual situation has been tried in the Courts involving the same taxpayer, *International Shoe Company v. Fontenot,* 236 La. 279, 107 So.2d 640. The Louisiana Supreme Court upheld the imposition of the tax. This Court denied certiorari, 359 U.S. 984, 3 L.Ed.2d 933.

There is ample jurisprudence of the United States Supreme Court upholding similar impositions under

similar circumstances. These cases have previously been cited herein: *Northwestern States Portland Cement Company v. Minnesota, Williams v. Stockham Valves and Fittings, Inc., Scripto, Inc. v. Carson, General Motors Corp. v. Washington* and cases cited therein.

The taxpayer's sole reason for instituting this action is the passage of Public Law 86-272 which the Collector of Revenue of Louisiana urges is unconstitutional. (See Paragraphs 18 and 19 of the petition, record page 14 and paragraphs 21-24 of the answer, record p. 27). The arguments therefor are limited to the validity of Public Law 86-272.

2. Public Law 86-272 Is A Regulation Of The States' Power To Tax—Authority For Which Is Not Granted To Congress By The Constitution.

When the Supreme Court of the United States first pronounced an act of Congress unconstitutional as it properly did in 1801 in the case of *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60, it recognized the principle of separation of powers and necessarily became the sole branch of our government charged with the power of interpreting the Constitution of the United States. All powers of the Federal government whether existing in the legislative, executive or judicial branches are embodied expressly or impliedly within the framework of the Constitution itself. Any act of the Congress which is beyond those powers is as inoperative as though it had never been enacted. (See *Norton v. Shelby County*, 118 U.S. 425 (1886)).

In order to answer the question presented herein

it is helpful first to review what Congress has done in the passing of Public Law 86-272. In the title of the act Congress boldly announces that its intention is to deal with "the power of the states to impose net income taxes". In the first section of the act, Congress seeks to limit an established power of the states. It is clear that the act would be unnecessary if the power of the states is not admitted. The act in no way seeks to regulate commerce or business or any aspect of commerce or business. Congress' only purpose is to state that two areas of factual connection or "nexus" establishing localization of a business giving rise to a state's jurisdiction to tax shall no longer be sufficient "nexus" factually to establish the state's taxing jurisdiction.

The question may then be stated: "Does the commerce clause allow Congress to establish a preferential immunity from state taxation for certain types of operations within a state whereby a multi-state business may gain relief from its share of the state tax burden?"

It would seem that if the commerce clause is not intended to give such preferential immunity to an interstate business then certainly Congress cannot broaden the meaning of the commerce clause of the Constitution by its own action. To do so would allow Congress to determine the Constitutional limitation upon the states' power to tax.

This Court has often expressed the proposition that the commerce clause did not immunize businesses

conducting interstate operations from paying their fair share of the cost of government in the states in which they operate. The Court in the very recent case of *General Motors Corporation v. Washington* (decided June 8, 1964, and not yet reported) again had occasion to enunciate this principle.

> "We start with the proposition that it was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their share of state tax burden even though it increases the cost of doing business. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). "Even interstate business must pay its way," *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252, 259 (1919), as is evidenced by numerous opinions of this Court. For example, the Court has approved property taxes on the instruments employed in commerce, *Western Union Telegraph Co. v. Attorney General*, 125 U.S. 530 (1888); on property devoted to interstate transportation fairly apportioned to its use within the State, *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891); on profits derived from interstate commerce by way of a net income tax, *William E. Peck & Co. v. Lowe*, 247 U.S. 165 (1918), and *United States Glue Co. v. Oak Creek*, 247 U.S. 321 (1918); by franchise taxes, measured by the net income of a commercially domiciled corporation from interstate commerce attributable to business done in the State and fairly apportioned, *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920); by a franchise tax measured on a proportional formula on profits of a unitary business manufacturing and selling ale, 'the proc-

> ess of manufacturing resulting in no profits until it ends in sales,' *Bass, Ratcliff & Gretton, Ltd., v. State Tax Comm'n*, 266 U.S. 271, 282 (1924); by a personal property tax by a domiciliary State on a fleet of airplanes whose home port was in the taxing State, despite the fact that personal property taxes were paid on part of the fleet in other States, *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944); by a net income tax on revenues derived from interstate commerce where fairly apportioned to business activities within the State, *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); and by a franchise tax levied on an express company, in lieu of taxes upon intangibles or rolling stock, measured by gross receipts, fairly apportioned, and derived from transportation within the State, *Railway Express Agency, Inc., v. Virginia*, 358 U.S. 434 (1959)."

While it is obvious that there are many areas in which Congress has power to act but has not done so, in this particular area the Constitution itself must contain any limitation upon the state's power. The states ceded only a limited portion of their sovereignty to the Federal Government. That power which was not given up by the states was retained. This is not only self-evident by the nature of the Constitution, but out of caution the states saw fit to place within the Constitution itself the Tenth Amendment: "The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people."

We concede, as this Court has often held, that

the commerce clause grants an extremely broad power to Congress to regulate commerce or business activities relating to commerce or methods of operating in commerce. However, if the power of Congress, as evidenced in Public Law 86-272, is affirmed, then Congress may control and rule virtually every aspect of the state governments. Certainly this was not the intention of the states when the Constitution was ratified. Those great Americans whose divergent views were compromised into our present Constitution did not intend that the Federal Government could seize control of the fiscal policies of the several states. If such had been the intent the form of the Constitution would have been entirely different and the views of Alexander Hamilton would have prevailed. But even a monarchist such as Alexander Hamilton did not suggest that the Constitution grants such power to Congress. Quite to the contrary Hamilton expressed the opinion that no such power existed in the Federal Government. In No. 32 of the Federalist, Hamilton had this to say to the people of the State of New York:

> "Although I am of opinion that there would be no real danger of the consequences which seem to be apprehended to the State governments from a power in the Union to control them in the levies of money, because I am persuaded that the sense of the people, the extreme hazard of provoking the resentments of the State governments, and a conviction of the utility and necessity of local administrations for local purposes, would be a complete barrier against the oppres-

sive use of such a power; yet I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

"An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repug-*

nant. I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interference in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority. These three cases of exclusive jurisdiction in the federal government may be exemplified by the following instances: The last clause but one in the eighth section of the first article provides expressly that Congress shall exercise "*exclusive legislation*" over the district to be appropriated as the seat of government. This answers to the first case. The first clause of the same section empowers Congress "*to lay and collect taxes, duties, imposts, and excises*"; and the second clause of the tenth section of the same article declares that, "*no State shall*, without the consent of Congress, *lay any imposts or duties on imports or exports*, except for the purpose of executing its inspection laws." Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned; but this power is abridged by another clause, which declares that no tax or duty shall be laid on articles exported from any State; in consequence of which qualification, it now only extends to the *duties on imports.* This answers to the second case. The third will be found in that clause which declares that Congress shall have power "to establish an UNIFORM RULE of naturalization throughout the United States." This must necessarily be exclusive; because if

each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE.

"A case which may perhaps be thought to resemble the latter, but which is in fact widely different, affects the question immediately under consideration. I mean the power of imposing taxes on all articles other than exports and imports. This, I contend, is manifestly a concurrent and coequal authority in the United States and in the individual States. There is plainly no expression in the granting clause which makes that power *exclusive* in the Union. There is no independent clause or sentence which prohibits the States from exercising it. So far is this from being the case, that a plain and conclusive argument to the contrary is to be deduced from the restraint laid upon the States in relation to duties on imports and exports. This restriction implies an admission that, if it were not inserted, the States would possess the power it excludes; and it implies a further admission, that as to all other taxes, the authority of the States remains undiminished. In any other view it would be both unnecessary and dangerous; it would be unnecessary, because if the grant to the Union of the power of laying such duties implied the exclusion of the States, or even their subordination in this particular there could be no need of such a restriction; it would be dangerous, because the introduction of it leads directly to the conclusion which has been mentioned, and which, if the reasoning of the objectors be just, could not have been intended; I mean that the States, in all cases to which the restriction did not apply, would have a concurrent power of taxation with

the Union. The restriction in question amounts to what lawyers call a NEGATIVE PREGNANT —that is, a *negation* of one thing, and an *affirmance* of another; a negation of the authority of the States to impose taxes on imports and exports, and an affirmance of their authority to impose them on all other articles. It would be more sophistry to argue that it was meant to exclude them *absolutely* from the imposition of taxes of the former kind, and to leave them at liberty to lay others *subject to the control* of the national legislature. The restraining or prohibitory clause only says, that they shall not, *without the consent of Congress*, lay such duties; and if we are to understand this in the sense last mentioned, the Constitution would then be made to introduce a formal provision for the sake of a very absurd conclusion; which is, that the States, *with the consent* of the national legislature, might tax imports and exports; and that they might tax every other article, *unless controlled* by the same body. If this was the intention, why not leave it, in the first instance, to what is alleged to be the natural operation of the original clause, conferring a general power of taxation upon the Union? It is evident that this could not have been the intention, and that it will not bear a construction of the kind.

"As to a supposition of repugnancy between the power of taxation in the States and in the Union, it cannot be supported in that sense which would be requisite to work an exclusion of the States. It is, indeed, possible that a tax might be laid on a particular article by a State which might render it *inexpedient* that thus a further

tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and of the State systems of finance might now and then not exactly coincide, and might require reciprocal forbearances. It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a preëxisting right of sovereignty.

"The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor, is not a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution. We there find that, notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act.

which justifies the position I have advanced and refutes every hypothesis to the contrary."

Hamilton's reasoning is as valid today as it was at the time of adoption of the Constitution.

The Supreme Court of the United States has also recognized that not all things that have an effect on interstate commerce constitute a regulation of that commerce. *(Schechter Corp., et al. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935)). Justice Cardozo noted in the *Schechter* case that there was nothing that happened in a society such as ours that could not be said to indirectly affect the whole, and that, therefore, all activity could be said to have an effect upon interstate commerce.

The *Schechter* case not only distinguishes for constitutional purposes between the direct and indirect effects of something on interstate commerce but indicates, in the following language, that this constitutional limit involves a judicial function:

> "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. *The precise line can be drawn only as individual cases arise, but the distinction is clear in principle.* * * *" (295 US 495, 546) (Emphasis added)

In *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 46; 60 S.Ct. 388, 392, 84 L.Ed. 565, 570 (1940) the Court noted:

". . . Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, *affect interstate commerce, which nevertheless fall short of the regulation of the commerce* which the Constitution leaves to Congress. . . ." (Emphasis Added)

As otherwise stated in *Philadelphia & Reading Railroad v. Pennsylvania*, 15 Wall. 284, 21 L.Ed. 164 (1873):

". . . every tax upon personal property or upon occupations, business or franchises, affects more or less the subjects and the operations of commerce. Yet it is *not everything that affects commerce that amounts to a regulation of it within the meaning of* the Constitution. . . ." (Emphasis added) (21 L.Ed. 164, 167-168).

To the same effect is *Minot v. Philadelphia W. & B. R. Co.*, 18 Wall. 206, 232, 21 L.Ed. 888 (1873)).

This Court, in analyzing the constitutional question here posed, must give recognition to these two basic limitations of the Congress' power under the language of the commerce clause; namely, first, that Congress does not define what constitutes its power and jurisdiction under the commerce clause and, second, that the power has been judicially said not to extend to all activities, events or transactions that in some way affect interstate commerce.

In addition, the decisions of this Court affirming the plenary power of Congress over commerce, such as *Prudential Insurance Company v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946) *State Board of Insurance v. Todd Shipyards, Inc.*, 370 U.S. 451, 82 S.Ct. 1380, 8 L.Ed. 620 (1962), and *Southern Pacific Co. v. Arizona ex rel Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945), recognize that the Congress, in the exercise of its power under the commerce clause is subject:

> ". . . to the restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the states." *(Prudential Insurance Company v. Benjamin*, 328 U.S. 408, 434).

The question remains as to what are these other constitutional provisions and the domains of action reserved exclusively for the states that restrict the power of Congress over interstate commerce. They certainly include the provisions of the United States Constitution pertaining to the separation of powers; therefore Congress, as part of its power to regulate commerce, could not assume powers of the judiciary. These provisions also certainly preclude congressional action that would be destructive of the federal system by so curtailing the taxing power of the states that their autonomous existence and sovereignty are impaired.

Other provisions of the federal constitution require that the power of Congress to regulate inter-

state commerce complies with the due process protection afforded individuals from unreasonable, arbitrary or capricious action. (Amendments to United States Constitution, Article V).

The sovereign position of the states has been stated thusly in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23 (1824) at page 198:

> "While affirming the power of Congress to regulate interstate commerce, it affirmed the independent powers of the states."

In *United States v. Railroad Co.*, 17 Wallace 322, 327-328, 21 L.Ed. 597 the Court affirmed the sovereign powers of the states in the following language:

> "The right of the states to administer their own affairs through their legislative, executive and judicial departments, in their own market through their own agencies, is conceded by the uniform decisions of this court and by the practice of the federal government from its organization."

The appellee's suggestion that the sovereign position of the states must find its protection in the will of a majority of Congress is absolutely foreign to and a negation of our constitutional system. The Constitution is designed to keep the balance between the states and the national government outside of the field of legislative controversy.

In reference to the right of the states to exercise their sovereign power to taxation over the activities

and events taking place within their confines, independent of Congress, this statement in the case of *State of Wisconsin v. J. C. Penny Co.*, 311 U.S. 435, 444, 61 S.Ct 246, 249, 85 L.Ed. 267 (1940) is apropos:

> "The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. *A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.*" (Emphasis added)

The constitutional doctrine of implied governmental immunity indicates that the existence of a federal system requires that the federal and state governments each be immune from taxation by the other and that neither alter the taxing power of the other by removing from this power subjects of taxation traditionally within their scope. *United States v. California*, 297 U.S. 175; 56 S.Ct. 421, 80 L.Ed. 567 (1936); *New York v. United States*, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326, (1946).

As stated by Justice Frankfurter in *New York v. United States*:

> "* * * the fear that one government may cripple or obstruct the operations of the other

> early led to the assumption that there was a reciprocal immunity of the instrumentalities of each from taxation by the other. It was assumed that there was an equivalence in the implications of taxation by a State of the governmental activities of the National Government and the taxation by the National Government of State instrumentalities. This assumed equivalence was nourished by the phrase of Chief Justice Marshall that 'the power to tax involves the power to destroy'. *McCulloch v. Maryland*, 4 Wheat. (US) 316, 431, 4 L.Ed. 579, 607. * * * " (90 L.Ed. 326, 330).

We respectfully urge that the conclusion is inescapable that Congress' action in passing Public Law 86-272 is far beyond the purview of the commerce clause. The commerce clause is designed to grant the power to regulate commerce or some aspects thereof. The exercise of the states' sovereign power to tax is not commerce or an aspect thereof. It is a governmental prerogative and fundamental power. Regulation of the states' taxing power may affect commerce for all taxation affects commerce. The curtailment of such a fundamental power of the states by the Federal Government violates the fundamental concept of our Federal system of government—the preservation of which is the very purpose of the Constitution itself.

3. Questions of Due Process Are Reserved To The United States Supreme Court for Interpretation.

Not only is Congress precluded from legislating in the field of state taxation of local events and activities judicially determined not to be a regulation

of interstate commerce, but it is precluded from legislating in the judicial area of due process of law.

In *Braniff Airways, Inc. v. Nebraska Board*, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967 (1954), Justice Douglas stated that the due process of law question was one which could not be delegated to Congress. In *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451, at 457, the Court said:

> "Congress, of course, does not have the final say as to what constitutes due process under the Fourteenth Amendment. . . ."

These due process restrictions, a subject of judicial development, are as applicable to the Congress under the Fifth Amendment as they are to the states under the Fourteenth Amendment. They qualify other constitutional provisions. *McCray v. United States*, 195 U.S. 27, 24 S.Ct. 769, 49 L.Ed. 78 (1904).

As stated in *Hurtado v. California*, 110 U.S. 516, 535, 4 S.Ct. 111, 28 L.Ed. 232 (1884):

> " . . . Due process of law in the latter [Fifth Amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice

> which lie at the base of all our civil and political institutions. * * *"

In *Railway Express Agency v. New York*, 336 U.S. 106, 112, 69 S.Ct. 463, 93 L.Ed. 533, 540 (1949), Justice Jackson affirmed:

> "* * * I regard it as a salutary doctrine that cities, states, and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. * * *"

Congress has no more right to discriminate against or unduly burden intrastate commerce than do the states to discriminate against interstate commerce. Thus, the classification restrictions in such a case as *Halliburton Oil Well Cementing Co., v. Reily*, 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed. 2d 202 (1963) are equally applicable here.

This principle was so applied in *Lappin v. District of Columbia*, 22 App. D.C. 68. The Court there held that Congress could not arbitrarily classify persons or property for taxation purposes within the District of Columbia where the Fourteenth Amendment was not applicable to congressional action. The Court noted, at page 76, in quoting Chief Justice Waite in *Munn v. Illinois*, 94 U.S. 113, 123, 24 L.Ed. 77, 83 (1877):

> "* * * "It is found [the principle that no person shall be deprived of life, liberty, or property without due process of law] in Magna

> Charta, and, in substance, if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the 5th Amendment it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the 14th as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States." * * *" * * *"

To the same effect are *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L.Ed. 455 (1875) and other cases cited by the Court in 22 App. D. C. 68.

The Court in the *Lappin* case held unconstitutional a brokerage license tax that imposed a higher tax on resident brokers than on nonresident brokers for business done in Washington. On page 80 of the opinion the court said:

> "But why should membership of exchanges organized in other States entitle one to a discrimination in his favor in the imposition of taxes for the pursuit of a calling of a general broker in the District of Columbia?
>
> ***
>
> "The statute, as we are constrained to regard it, by imposing an unreasonable burden upon the right of a citizen to pursue a lawful occupation open to his competitors upon less onerus terms—which right of occupation is, as we have seen, of the nature of property—operates substantially as the taking of property without due process of law, and is therefore within the prohibition of the 5th Amendment of the Constitution."

It is thus clear that the power of Congress to regulate a business engaged in interstate commerce is on an entirely different constitutional footing than any power it might have to curtail the sovereign taxing power of the several states.

We are brought to a determination of the constitutional foundation for, and the constitutional effect of Public Law 86-272 and to a determination of whether or not, subject to the restrictions alluded to, it can stand as a valid regulation of interstate commerce by the Congress.

Contrary to the arguments advanced by the taxpayer in this cause, cases such as *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 66 S.Ct. 1142, 90 L.Ed. 1342 (1946), *Southern Pacific Co. v. Arizona*, 325 U.S. 761 65 S.Ct. 1515, 89 L.Ed. 1915 (1945), *State Board of Insurance v. Todd Shipyards, Inc.*, 370 U.S. 451 (1961), do not support the notion that Congress can override other constitutional limitations in the exercise of its power to regulate interstate commerce, particularly the right to overrule a judicial determination of what constitutes a regulation of commerce between the states under the Constitution. Congress, in these cases relied upon by the taxpayer was exercising legislative power within judicially prescribed bounds. Congress has never before attempted to include within the orbit of its constitutional authority over interstate commerce something that the Supreme Court of the United States has declared to be beyond the scope of Congressional power. The Supreme Court of

the United States has neither held nor implied that Congress, in exercising its power over interstate commerce, may supersede and reduce the sovereign taxing power of the states to the extent attempted in P.L. 86-272.

The responsibility of this Court in the instant case is to determine in reference to the total Constitution—not just the commerce clause—whether Public Law 86-272 is valid. Public Law 86-272 overrules this Court's holdings as to what constitutes "nexus" sufficient to support state taxation.

In overruling the Court's decisions Congress has attempted to broaden the scope of what has been judicially determined to be the regulation of interstate commerce and to redefine jurisdictional due process for income tax purposes and thereby curtail the taxing power of the states over instate activities and events. The Court found that the imposition of a nondiscriminatory net income tax in the area prohibited by Public Law 86-272 did not constitute a regulation of interstate commerce and met due process of law requirements. In so concluding, the Court considered the questions of possible multiple taxation, discrimination and undue burden, and the relationship and effect of what was being taxed by the state to the free flow of commerce.

The majority of this Court in *Northwestern-Stockham* specifically found the absence of any circumstances that would bring a properly apportioned

nondiscriminatory net income tax such as we have here within the scope of the commerce clause.

Public Law 86-272, by its language, is directed to due process, *nexus* or jurisdictional problems and not to regulation of commerce. It purports to restrict sovereign taxing power and seeks to tie the hands of the judiciary in determining whether or not the effect of the tax as applied to a particular taxpayer constitutes an unreasonable or undue interference with interstate commerce. It would preclude a judicial weighing of the relative interests of the states and the nation. This weighing has been found necessary for preservation of the federal system and the discharge of the traditional separation of judicial and legislative powers.

4. Public Law 86-272 Violates The Principle Of Equality Of The States.

The principle of equality of the states in the exercise of their sovereignty has been ruled upon by the United States Supreme Court only in connection with the provisions of certain enabling acts for statehood. Nonetheless if the principle is applicable at the moment that a state becomes a member of the Union upon an equal basis with all other states, then the principle of equality must exist forever thereafter.

Legislation such as Public Law 86-272 which seeks to describe the particular factual situations under which a state may or may not exercise its sovereign power will necessarily take away an element of sovereignty from those states which per chance

happen to be possessed of the particular relationship with multi-state business that Congress chooses to exempt from the states' taxing power.

The first case in which the Supreme Court of the United States clearly enunciated the principle of equality of the states is *Coyle v. Smith*, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853, 1911.

Basically the rule is that all the states have equal political power. Each is at liberty to assert its sovereign power within its jurisdiction to the same extent that any other state may do so.

The United States Supreme Court in the case of *Coyle v. Smith*, answered the question of whether or not Congress has authority to limit a state's sovereign power. *Coyle v. Smith* involved a challenge to a 1910 Oklahoma legislative act providing for the change of the capitol city of Oklahoma from Guthrie to Oklahoma City. The challenge to the validity of the act was based upon a provision of the Oklahoma statehood enabling act which provided that the capitol shall remain at Guthrie until 1913.

The United States Supreme Court stated the question presented.

> "The only question for review by us is whether the provision of the enabling act was a valid limitation upon the power of the state after its admission, which overrides any subsequent state legislation repugnant thereto." (221 U.S. 559, 31 S.Ct. 688, 689)

The Court then observed:

"The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained." (221 U.S. 559, 31 S.Ct. 688, 689)

Then the Court stated that the question was reduced to:

"Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission?" (221 U.S. 559, 31 S.Ct. 688, 689)

"The power of Congress in respect to the admission of new states is found in the 3d section of the 4th article of the Constitution. That provision is that, 'new states may be admitted by the Congress into this Union.' The only expressed restriction upon this power is that no new state shall be formed within the jurisdiction of any other state, nor by the junction of two or more states, or parts of states, without the consent of such states, as well as of the Congress." (31 S.Ct. 688, 690)

The United States Supreme Court affirmed the validity of the Oklahoma act removing the state capitol. In doing so the Court reaffirmed the sovereignty of each state as an independent entity equal in its sovereignty and power to every other state in the Union:

" 'The Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission." (31 S.Ct. 690)

The Court concluded its opinion as follows:

"Has Oklahoma been admitted upon an equal footing with the original states? If she has, she, by virtue of her jurisdictional sovereignty as such a state, may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot.

"In *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227, 237, Chief Justice Chase said in strong and memorable language that 'the Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible states.'

"In *Lane County v. Oregon*, 7 Wall. 76, 19 L. Ed. 104, he said:

" 'The people of the United States constitute one nation, under one government; and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each state compose a state, having its own government, and endowed with

all the functions essential to separate and independent existence. The states disunited might continue to exist. Without the states in union there could be no such political body as the United States.'

"To this we may add that the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When the equality disappears we may remain a free people, *but the Union will not be the Union of the Constitution.*" (Emphasis Supplied) (31 S.Ct. 688, 695)

The above quoted observations of Mr. Justice Lurton were the wise reiteration of the fundamentals upon which this nation was founded and upon which it must endure. How do these observations fit the case at hand? Public Law 86-272 deprives so called "consumer" states of a sovereign and fundamental power. It renders them unequal in sovereign power to the so called "industrialized" states whose connection with the taxpayer may be different in form but certainly no greater in fact. The inequality of effect is not patent on the face of the act. The act is made to appear to be equally applicable to all states. The result, however, is that only the less industrialized states are affected. The more industrialized states will ordinarily have more than salesmen present within their border and have tax jurisdiction under the act. It is the businesses in those states that send to the other states salesmen to exploit markets in other states. It is only the consumer state whose power to tax has been seriously impaired by the act.

This type of discrimination by Congress against a group of states, if held valid, could result in destroying the freedom of the state governments to devise the economic and fiscal policies best suited to the particular economic resources of each.

It is apparent that *nexus* is a question of fact. The necessary fact is an in-state relationship—*something local which exists and is apart from the interstate commerce itself.*

Once *nexus* has been established the taxpayer has subjected himself to the authority of the state. Connection exists as a matter of *fact*, the fact of a local event. The taxpayer has by his action submitted himself, his property or his business or an aspect thereof, to the authority of the state.

Regardless of the particular type of relationship, operation, or function establishing the connection, it cannot logically be said that one type of local event establishes any more or any less connection than another type of local event establishes connection. The connection, nexus or jurisdiction is complete if it is present at all.

A business may establish a factual connection with one state by building a factory. In another state the connection may be by incorporation under the laws of that state. In yet another it may be the presence of salesmen and exploitation of the market that establishes the connection. Each state has connection; each state has jurisdiction to the extent of the connection.

True, the facts which establish connection are different but the existence of connection is the same.

For Congress to say that the presence of salesmen—a factual connection held sufficient to establish jurisdiction—does not establish jurisdiction to tax, divests the "consumer" states of power to tax that which is within its jurisdiction. Yet Congress would allow the presence of a factory in a "producing" state to support the power to tax. The principle of equal sovereignty among the states has been destroyed. The "consumer" and "agricultural" states are relegated to a position as second class states no longer possessed of the power to exercise their sovereignty over local aspects of business which operates within its borders, while "industrial" states are free to exercise their tax powers, because their jurisdiction is based on different types of connection.

The Courts should be most zealous to preserve the sovereign equality of the states. Failure to do so would allow a majority group of states to hinder and impede the economic development of sister states by designing Congressional definition of "nexus" to effectively prohibit the smaller group from enacting the State's charge for the local exploitation of its resources, and for the benefits, privileges and advantages obtained by those who come within the state and subject themselves to the state's authority.

Congress, in enacting Public Law 86-272, has created a group of states unequal in sovereign power to their sister states—exactly what is prohibited by the rule of *Coyle v. Smith*. Those states in which produc-

tion takes place have "retained" the power to tax that which is within their jurisdiction. The states in which their products are sold are deprived of jurisdiction. Public Law 86-272 should not only be struck down as unconstitutional but should be denounced as an arrogant, unconstitutional attempt to usurp power not granted to Congress.

5. Public Law 86-272 Is Arbitrary And Unreasonable In That It Uses Distinctions Without Constitutional Significance And Thereby Discriminates Against Other Interstate Business As Well As Local Business.

Public Law 86-272 does not conform to due process requirements of reasonable classification imposed upon Congress by the Fifth Amendment to the United States Constitution. The classifications employed in Public Law 86-272 are arbitrary and without Constitutional foundation. Public Law 86-272 constitutes an unreasonable effort to redefine, contrary to express judicial pronouncements, due process of law for establishing *nexus* or jurisdiction. Its only effect is to create large areas of tax immunity to the economic advantage of a certain arbitrarily defined segment of the business community at the expense of the remainder of the business community and the sovereign taxing power of the states. Simultaneously, it attempts to impede the necessary judicial function involved in balancing national and state interests where their respective powers collide.

It is easily demonstrated from the express provisions of Public Law 86-272 and judicial precedent in

the field of state taxation of multistate businesses, as well as by the testimony before the congressional committees concerning this legislation, that the classifications there employed are predicated on arbitrary and artificial due process of law distinctions. These distinctions have already been found by the Supreme Court of the United States to be without constitutional significance. The act makes immunity, for example, turn upon the question of whether an order is formally stamped "Accepted" without the state, which is purely a matter of form under modern business practice and should not be controlling in determining the ability of the state to impose a tax. Where the paper work is done is immaterial for commerce clause purposes. Thus, in *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340, 344, 88 L.Ed. 1313, 64 S.Ct. 1019 (1944), it made no difference for Indiana gross receipts tax purposes that a contract was made without the state. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1938), held that the fact that a contract is made between persons in different states is immaterial for state gross receipts tax purposes.

Public Law 86-272 would likewise make taxability or immunity dependent upon questions of whether persons carrying on the activity of a taxpayer within a state are designated "employees", "independent contractors" or "independent dealers". It would ascribe to each of these groups a different sphere of activity for immunity purposes. Yet, the Court in *Scripto v. Carson*, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed. 660 (1960),

recognized that a consideration of whether or not a person is a salesman or independent contractor or employee is without constitutional significance.

The statute would further make immunity dependent upon the existence of the maintenance of an office within the state by an employee, as distinguished from an "independent contractor" or "independent dealer". This criteria for determining jurisdictional due process and the commerce regulatory effect of a state income tax has also been held irrevelant. In the *Northwestern-Stockham* cases, 358 U.S. 450, the Court specifically pointed out that the jurisdiction of Georgia and Minnesota to tax in those cases and California to tax in *West Publishing Co. v. McColgan*, 328 U.S. 823, 66 S.Ct. 1378, 90 L.Ed. 1603 (1946) did not turn upon whether or not the taxpayer technically had office space in its name within the state.

By employing such distinctions, Public Law 86-272 assumes that Congress can permit selected multi-state businesses to conduct local activities free of state and local taxation in direct competition with local businesses. No authority supports this novel proposition. The interstate commerce decisions and the due process decisions are predicated on the contra-proposition that interstate commerce must pay its way so long as it is freed from discriminatory and burdensome state taxation. These considerations, in turn, cannot be dependent upon formal distinctions that make no difference in the practical operation of a business and the relationship of a tax to either jurisdictional prerequisites or interstate commerce.

CONCLUSION

In resolving the question herein presented, it is significant to note that the great fundamental issue which Public Law 86-272 raises has never been adjudicated by the United States Supreme Court. The issue is:

> Does the national government possess the same power to prohibit all state taxation of business engaged in interstate commerce as it has to regulate business engaged in interstate commerce?

Such legislation portends a new era in federal-state relations in the field of state taxation. Heretofore a state possessed the unquestioned power to impose its taxes upon firms engaged in multiple-state operattions unless the application of the tax imposed an undue burden on or discriminated against interstate commerce.

Petitioner asks this Court to hold that this adjustment between national and state power can be supplanted by the radical rule that no state tax can stand against federal prohibition insofar as it applies to any business affecting interstate commerce. This Court is asked to hold further that the traditional constitutional safeguard against arbitrary legislative action, such as equal protection and due process of law requirements, are to be eliminated by Congressional action.

Such a holding will permit state and local jurisdiction to be superceded by federal action regulating virtually all nonresidents and foreign corporations.

It also will permit locally based businesses to be discriminated against by requiring them to bear the entire state and local tax burden imposed, irrespective of the nature and magnitude of competing interstate activities or multi-state businesses. Since taxing jurisdiction is basic to political existence, when it is taken away all other powers fail, and the power to exist as a body politic is gone. An equal tax burden on competing segments of the business community is necessary for the continued existence of local segments of business. Such a result clearly was not intended when the Constitution was formulated.

For the reasons herein stated, it is respectfully submitted that Public Law 86-272 is unconstitutional for the following reasons:

1. The imposition of a net income tax on income derived from sources within a state does not constitute a regulation of interstate commerce but in fact constitutes unconstitutional curtailment of the states sovereign power to tax and therefore Congress is without power to forbid it.

2. Congress does not have constitutional authority to overrule the decisions of the Supreme Court of the United States which prescribe due process of law limitations on a state's power to tax net income from sources and activities within its jurisdiction. To allow Congress such power which is the equivalent of defining the scope of its own authority violates the principle of separation of legislative and judicial power.

3. To allow Congress to prescribe the factual situations under which a states' sovereign power may

be exercised destroys the principle of equality of the states.

4. Public Law 86-272 discriminates against other interstate business as well as local business by the use of arbitrary and unreasonable distinctions which have no constitutional significance.

PRAYER

WHEREFORE, Ashton J. Mouton, Collector of Revenue of the State of Louisiana, respectfully prays that the Honorable Supreme Court of the United States issue a writ of certiorari directed to the Supreme Court of the State of Louisiana in the above numbered and captioned matter and after due proceedings and argument that the decision of the 19th Judicial District Court of the State of Louisiana as affirmed by the Supreme Court of the State of Louisiana be reversed and set aside and that Public Law 86-272 be declared unconstitutional.

CHAPMAN L. SANFORD

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APPENDIX A

Reasons for judgment and judgment of the Nineteenth Judicial District Court of Louisiana.

This is a suit for the refund of income tax moneys paid to the State of Louisiana by plaintiff, International Shoe Company. The tax years are fiscal 1959 and 1960. The sum at issue, inclusive of interest, is $6,191.83.

Plaintiff is engaged in the manufacture, sale and distribution of shoes. During all times pertinent here, plaintiff had no activities whatsoever in Louisiana except that it sent into Louisiana fifteen traveling salesmen who solicited orders for shoes, which orders were forwarded to plaintiff, in Missouri, through channels of interstate commerce, for acceptance or rejection outside the State of Louisiana. Where accepted, such orders were filled from sources outside Louisiana and shipped to the purchasers, through the channels of interstate commerce. Plaintiff had no office, or warehouse, or any place of business of any sort in Louisiana.

The Congress of the United States, in Public Law 86-272, 73 U.S. Statutes 555, 15 U.S.C.A. Sec. 381, approved September 14, 1959, has specifically prohibited the states, including Louisiana, from collecting an income tax from a multi-state business concern, such as plaintiff, which has no connection, or "nexus", with the taxing state other than the solicitation of such orders by traveling salesmen. The Louisiana Collector of Revenue does not deny that he is attempting to

collect this tax in direct violation of the Congressional prohibition. The Louisiana Collector of Revenue simply says that Congress lacks power, under the Federal Constitution, to prohibit such taxation by the States.

The problem here is of nationwide importance. The parties have stipulated that, throughout the United States, many thousands of other taxpayers, that is, multi-state merchandisers, are similarly situated. The Louisiana Collector takes the position, inter alia, that the silence of Congress and its failure to act in this field, for over a period of 170 years, is a tacit concession that Congress lacks the power to enact such legislation. On the other hand, the taxpayer, International Shoe Company, contends that the Congressional statute is soundly based upon the powers delegated to Congress, by the several states, in the Federal Constitution. International Shoe Company specifically cites the commerce clause, the due process clause and the equal protection clause of the Fourteenth Amendment, the taxing powers of Congress, and the supremacy clause.

Therefore, the only issue of this case is the question of whether or not Congress has power, under the Constitution of the United States, to enact P.L. 86-272.

In early 1959, the Supreme Court of the United States rendered its joint decision in two cases, *Northwestern States Portland Cement Company v. Minnesota and Williams v. Stockham Valves & Fitting, Inc.*, 358 U.S. 450; 79 S. Ct. 357; 3 L.Ed 2d 421; 67 ALR 2d 1292.

This landmark decision, hereinafter called the Northwestern-Stockham decision, is frequently cited as establishing the proposition that an American state could levy a properly apportioned net income tax upon a foreign corporation not authorized to do business in the state, based upon the net income derived from operations within the state, where the only connection, or "nexus", as the Supreme Court called it, with the taxing state was the fact that the foreign corporation sent into the state soliciting agents, or traveling salesmen, who solicited orders, which orders were accepted outside the state and, pursuant to which orders, goods were shipped into the state through the channels of Interstate Commerce. This is a fair statement of the doctrine of this decision with one factual modification, and that is that in each of these two cases the taxed corporation *not only sent soliciting agents* into the state, *but also maintained an office*, i.e., had a permanent business establishment, within the taxing state.

The Louisiana counterparts of this important litigation were *Brown-Foreman Distillers v. Collector of Revenue*, 234 La. 651, 101 So. 2d 70 (1958), appeal dismissed and certiorari denied, 359 U.S. 28 (1959), and *International Shoe Company v. Fontenot*, 236 La. 279, 107 So. 2d 640, certiorari denied, 3 L.Ed. 2d 933 (1959). In both of these Louisiana cases, the decisions were in favor of the taxing power of the state. In each case, the Supreme Court of the United States refused to review the Louisiana court's decision. The refusal to review the Louisiana cases followed the Northwestern-Stockham decision by only a few weeks.

The two Louisiana cases each differed from the Northwestern-Stockham situation in that neither of the taxpayer corporations maintained an office, or other permanent business establishment, within the taxing state.

Subsequently, Congress enacted the statute now in question, Public Law 86-272, which prohibits the imposition, assessment, levy and/or collection of such an income tax by a state in a case where the only nexus with the taxing state is the sending of such soliciting agents, traveling salesmen, into the state.

Thus, Congress drew a line between the Northwestern-Stockham situation, where there was an office within the state, and the International Shoe Company type of situation, where there is no office within the state and where the only "nexus" with the taxing state consists of the activities of the traveling salesmen. The Northwestern-Stockham decision was not legislatively overruled. Where there is an office within the state, as in the Northwestern-Stockham cases, Congress has not prohibited the state from collecting the income tax. Where there is no office within the state, as in the present litigation, Congress has forbidden the states to assess or collect a state income tax.

The Louisiana Collector can succeed in this matter only if this Court should declare that the cited Act of Congress is beyond the constitutional authority of that legislative body. Plaintiff taxpayer contends that the Congress of the United States does possess adequate authority to enact this statute.

After careful consideration, this Court concludes that the position of taxpayer is correct and that Congress is expressly given the power to enact such a statute by the very terms of the commerce clause, Section 8, clauses 1 and 3, which, in plain language, state "The Congress shall have the power to regulate commerce among the several states," and, secondly, under the provisions of the supremacy clause, Section 6, clause 2, which provides that the Constitution, and laws of the United States made in pursuance thereof, are the supreme Law of the Land, and the Judges in every State are bound thereby.

In answer to the argument that Congress lacks the power to enact laws regulating interstate commerce, our Supreme Court of the United States, as early as 1824 stated, in *Gibbons v. Ogden*, 9 Wheat. 1, at pp. 196, 197, 6 L.Ed 23, at p. 70, as follows:

> "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elec-

> tions; are. . . the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

In 1883, in *Transportation Co. v. Parkersburg*, 107 U. S. 691, at pp. 700, 701, 27 L.Ed. 584, at pp. 588, the Supreme Court said this:

> ". . .the United States, through Congress is vested with supreme and paramount authority in the regulation of commerce. . . among the several States. . .
>
> "It is the Congress, and not the judicial department, to which the Constitution has given the power to regulate commerce. . . among the several States. . ."

In the same case, the Court made it clear that "Inaction by Congress. . .", as to local matters within the power of Congress to regulate,

> ". . .is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that, for the time being, and until it (Congress) sees fit to act, they may be regulated by state authority."

In the Northwestern-Stockham, supra, decision, Mr. Justice Clark had this to say:

> "It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from and direct restrictions or impositions by the states."

In *Northwest Airlines, Inc. v. State of Minnesota*, 322 U.S. 292, at pp. 303, 304; 88 L.Ed. 1283, at p. 1290 (1944), Mr. Justice Jackson used these words:

> "Congress has not extended its protection and control to the field of (state) taxation, although I take it no one denies that constitutionally it may do so. It may exact a single uniform federal tax on the property or the business to the exclusion of taxation by the states. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax-free altogether."

And, in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, at p. 165; 98 L.Ed. 583, at p. 591 (1954), Mr. Justice Clark stated:

> "Some have thought that the wisest course would be for this Court to uphold all state taxes not patently discriminatory, and wait for Congress to adjust conflicts when and as it wished."

Mr. Chief Justice Hughes, speaking in *State of Minnesota v. Blasius*, 290 U.S. 1, at pp. 8, 9; 54 S. Ct. 34; 78 L. Ed. 131, at p. 135 (1933), made it clear that the states have power to legislate or pass taxes affecting interstate commerce only while Congress is silent; that when Congress has exercised its paramount authority, that exercise of power ipso facto terminates the states' rights over local subjects affecting interstate commerce. He said:

> "The states may not impose direct burdens upon interstate commerce; that is, they may not regulate or restrain that which from its nature should be under the control of the one authority

and be free from restrictions save as it is governed in the manner that the national legislature constitutionally ordains. This limitation applies to the exertion of the state's taxing power as well as to any other interference by the state with the essential freedom of interstate commerce. Thus, the states cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it.

"Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the state may act until Congress, if it has paramount authority over the subject, substitutes its own regulation."

The plenary power of Congress under the commerce clause had been recognized by the Supreme Court in many other decisions. Thus, in *South Carolina Hwy. Dept. v. Barnwell Brothers*, 303 U.S. 177, at pp. 189, 190; 82 L.Ed. 734 (1937), Justice Stone said:

"Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. . . . They (the courts) cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interest of a national commerce."

Again speaking for the Court in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, at p. 769, 89 L.Ed. 1915 (1945), Justice Stone, then Chief Justice, stated:

> "For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of congressional legislation, thus affords some protection from State legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the State legislature, is under the commerce clause the final arbiter of the competing demands of State and national interests. (Citations omitted.) Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the States to regulate the commerce in a manner which would otherwise be not permissable (citations omitted), or exclude the State regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce." (Citations omitted)

The power of Congress under the commerce clause extends into the area of state and local taxation. In *Freeman v. Hewit*, 329 U.S. 249, at pp. 252, 253; 91 L.Ed. 265 (1946), involving the Indiana gross income tax as applied to sales of securities on the New York Stock Exchange, Justice Frankfurter, speaking for the majority, said:

> "These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a state under the taxing power rather than under mani-

festations of police power in the conventional sense. . . . To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function. Moreover, the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a state of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. The task of scrutinizing is a task of drawing lines. This is the historic duty of the Court *so long as Congress does not undertake to make specific arrangements between the National Government and the States in regard to revenue from interstate commerce.*" (Emphasis supplied.)

Mr. Justice Frankfurter dissenting in the Northwestern-Stockham, supra, case was specific in his statement that this was a field which could be and should be occupied by Congress:

"At best, this Court can only act negatively; it can determine whether a specific state tax is imposed in violation of the Commerce Clause. Such decisions must necessarily depend on the application of rough and ready legal concepts. We cannot make a detailed inquiry into the incidence of diverse economic burdens in order to determine the

extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subtleties of the interrelated economics of Nation and State.

"The problem calls for solution by devising the congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the State and the needed limits on such state taxing power. Congressional committees can make studies and give the claims of the individual States adequate hearing before the ultimate legislative formulation of policy is made by the representatives of all the States. The solution to these problems ought not to rest on the self-serving determination of the States of what they are entitled to out of the nation's resources. Congress alone can formulate policies founded upon economic realities, perhaps to be applied to the myriad situation involved by a properly constituted and duly informed administrative agency." 3 L.Ed. 2d, at p. 449.

It is the conclusion of this Court that, in enacting Public Law 86-272, the Congress was properly acting under authority granted to it by the Constitution of the United States, in particular, but without limitation, under the authority of the Commerce Clause. This Court holds, therefore, that Public Law 86-272 is constitutional. Hence the Louisiana Collector of Revenue has no right to collect the tax here in question, and

the taxpayer is entitled to the refund herein sought.

For the foregoing reasons, judgment is rendered and will be signed in favor of the plaintiff taxpayer, International Shoe Company, and against the Collector of Revenue of the State of Louisiana, requiring the Collector to refund to International Shoe Company the moneys paid under protest, plus legal interest thereon as provided in L. R. S. 47:1576.

The plaintiff is not entitled to recover costs from the Collector. L. R. S. 13:4521. See Halliburton Oil Well Cementing Company vs. Reily, Collector of Revenue, 241 La. 67, 127 So. 2d 502 (1961).

Baton Rouge, Louisiana, this 12th day of July, 1963.

/s/ FRED A. BLANCHE, JR.
Judge

JUDGMENT

This cause having been duly heard and submitted to the court for adjudication upon briefs and oral argument, and the court considering the law and the evidence to be in favor of the plaintiff for the reasons contained in the written opinion of this court dated the 12th day of July, 1963,

IT IS ORDERED, ADJUDGED AND DECREED that there by judgment herein in favor of the plaintiff, International Shoe Company, and against the defendant, Roland Cocreham, Collector of Revenue of the State of Louisiana, in the sum of Six Thousand One Hundred and Ninety-one Dollars and Eighty-three Cents ($6,191.83), plus interest at the rate of two per cent (2%) per annum from April 26, 1962 until payment is made.

Judgment rendered in open court the 12th day of July, 1963. Judgment read and signed in open court this 29th day of July, 1963, at Baton Rouge, Louisiana.

/s/ FRED S. LeBLANC
Judge, Nineteenth Judicial
District Court

APPENDIX B

Opinion of the Supreme Court of Louisiana.

McCALEB, Justice.

International Shoe Company brought this suit against the Collector of Revenue to recover state income taxes amounting to $6191.83, which it paid under protest for the fiscal years ending November, 1959 and November, 1960. Plaintiff pleads the provisions of Public Law 86-272 (73 U.S.Stat. 555; 15 U.S.C.A. § 381), as a bar to the State's right to collect the income taxes for the years in question.

Previously, this Court held, under an identical state of facts, that plaintiff was liable for the state taxes upon its net income arising from its operations in Louisiana. *International Shoe Company v. Fontenot*, 236 La. 279, 107 So.2d 640, certiorari denied 359 U.S. 984, 79 S.Ct. 943, 3 L.Ed.2d 933. That case was a counterpart of *Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La. 651, 101 So.2d 70, in which the Supreme Court of the United States dismissed an appeal and also denied certiorari. See 359 U.S. 28, 79 S.Ct. 602, 3 L.Ed. 2d 625.

In February of 1959, the Supreme Court rendered its judgment in the consolidated cases *Northwestern States Portland Cement Company v. Minnesota* and *Williams v. Stockham Valves and Fittings, Inc.*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421, 67 A.L. R.2d 1292. This decision upheld the contentions of the states of Minnesota and Georgia that a nondiscriminatory properly apportioned net income tax could be levied

and collected from foreign corporations not authorized to do business in the taxing states whose activities in those states were purely of an interstate character. The ruling was based upon a determination that the net income derived from the operations of the corporations within the taxing states provided a sufficient connection or "nexus" with Minnesota and Georgia for taxing purposes. There, each corporation maintained an office in the taxing state from which its salesmen solicited orders from local customers, which orders were transmitted for acceptance outside of the state and, where accepted, were fulfilled by the shipment of tangible goods into the state through the channels of interstate commerce.

Presumably, on the authority of the Northwestern-Stockham decision, the Supreme Court later denied certiorari in the Brown-Forman case and *International Shoe Company v. Fontenot*, although these corporations did not have local offices from which the operations were conducted.

Subsequent to the denial of certiorari in the Louisiana cases, Congress passed Public Law 86-272. The pertinent section of that statute (Title I, Section 101), provides as follows:

> "§ 101. Imposition of net income tax—Minimum standards
>
> "(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, *a net income tax* on the income derived within such State by any person from interstate commerce *if the only busi-*

ness activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

"*(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property*, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

"(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)." (Italics ours).

Plaintiff is a Delaware corporation having its principal place of business in St. Louis, Missouri. According to the admitted facts, the only activities conducted by plaintiff within Louisiana during the relevant period were that it sent into this State travelling salesmen who solicited orders for shoes, which orders were forwarded to the home office and, when accepted, were filled and the merchandise shipped from outside the State. Plaintiff had no office or warehouse or any place of business of any sort within this State.

It is not denied by the Collector that the income taxes for the years 1959 and 1960 assessed against plaintiff were violative of the Federal Statute. His position is that Congress did not have the power to adopt Public Law 86-272 and specially asserts that it was without authority to prohibit the states from

levying taxes for their support under the guise of regulating interstate commerce. The argument runs that, since the several states expressly abandoned their power to tax imports and exports and to levy tonnage taxes in Section 10 of Article 1 of the Federal Constitution, they retained their historic power of taxation in all other areas and that, therefore, Public Law 86-272 necessarily impinges upon the rights reserved to them by the Tenth Amendment to the Constitution.

Plaintiff, on the other hand, contends that Congress was vested with plenary power to enact P.L. 86-272 under the Commerce Clause (Clause 3 of Section 8 of Article 1 of the Federal Constitution) and implicit in this power to regulate commerce is the power to prohibit the states from levying taxes on multistate businesses engaged in interstate commerce whenever Congress finds, as it has in this case, that such taxes burden the free flow of trade. Plaintiff further pleads that the Act of Congress, being the supreme law of the land (Clause 2, Article 6 of the Constitution), overrides all state laws in conflict therewith.

After a hearing on these issues the district judge, in a well-considered opinion, found for plaintiff and judgment was entered against the Collector requiring him to refund the monies paid under protest, plus legal interest, as provided in R.S. 47:1576. The Collector has appealed, reurging his contention that P.L. 86-272 transcends the authority delegated to Congress under the Commerce Clause and is, therefore, unconstitutional.

[1] Since the admitted facts of the case disclose that plaintiff is engaged purely in an interstate operation, we approach the issue of the constitutionality of P.L. 86-272 with some diffidence. For, in view of the Supremacy Clause of the Federal Constitution,[1] and the fact that Congress has acted *ostensibly* within the ambit of its delegated power to regulate commerce, it would appear that congressional occupation in this field has rendered ineffective any state legislation on the subject and it might well be said that the state judiciary is restrained by the Constitution from considering the invalidity of the Federal Act. Manifestly, if conflict exists between the power of Congress to regulate commerce and the State's right to impose a tax affecting such commerce, the Act of Congress is supreme[2] no matter whether the burden of the tax be direct or indirect.

Nevertheless, we prefer not to rest our decision herein upon plaintiff's challenge of our right to consider the validity of P.L. 86-272. The case is one of

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[1] The pertinent part reads: "This Constitution, and the *Laws* of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; *and the Judges in every State* shall be bound thereby * * *". (Italics ours).

[2] See *McCulloch v. The State of Maryland*, 4 Wheat. 316, 4 L.Ed. 579; *Case v. Bowles*, 327 U.S. 92, 66 S.Ct. 438, 90 L.Ed. 552. See also *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23; *Hauenstein v. Lynham*, 100 U.S. 483, 25 L.Ed. 628: *Sinnot v. Davenport*, 22 How. 227, 16 L.Ed. 243; *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447; *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 and *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 62 S.Ct. 491, 86 L.Ed. 754.

national importance[3] which involves principally a clash between the right of the several states, acting under their taxing powers, to require that interstate business bear a fair share of the cost of local government in return for benefits received and the power of Congress to regulate the free flow of interstate commerce by prohibiting the states from levying an income tax on persons engaged in interstate commerce whose only connection with the State is the sending of salesmen therein to solicit orders. The Collector, and counsel for amici curiae aligned with him, are here contending that the Supremacy Clause is inapplicable because the Act of Congress is not a regulation of commerce and, consequently, the law was not "* * * made in Pursuance * * *" of the Constitution. And, while plaintiff alleged the Supremacy Clause as one of the grounds for upholding P.L. 86-272, the point has neither been pressed in oral argument nor has much emphasis been given it in the voluminous briefs filed in plaintiff's behalf.

Taking into account all these circumstances, we fell that it is incumbent upon us to decide the main issue, even at the risk, perhaps, of encroaching the

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[3] In this Court briefs by amici curiae have been filed on behalf of the Collector by the attorneys general of 19 states. These states are Alaska, Arizona, Arkansas, Colorado, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, North Dakota, Oregon, Pennsylvania, South Dakota and Washington. Other amici curiae breifs have been filed on behalf of plaintiff by 40 nation-wide trade associations representing 71,105 multi-state merchandisers and 17 state manufactures' associations.

periphery of our judicial authority as circumscribed by the Supremacy Clause.

The initial point raised in the brief of amici curiae representing the 19 states is that the imposition of a tax measured on net income derived from sources within a state, albeit in interstate transactions, does not constitute a regulation of interstate commerce and, hence, Congress is without power to forbid it. In support of this proposition, much dependence is placed on an article by Mr. Robert L. Roland (formerly Collector of Revenue of Louisiana) appearing in 46 Va.Law Review 1172, entitled "Public Law 86-272: Regulation or Raid". It is declared at page 1184 of that article that "There is no real basis to dispute that a tax upon net income derived from interstate commerce is not a tax upon such commerce." As authority for this statement, the author cites *Peck & Company v. Lowe*, 247 U.S. 165, 38 S. Ct. 432, 62 L.Ed. 1049; *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 38 S.Ct. 499, 62 L.Ed. 1135; *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 62 S.Ct. 857, 86 L.Ed. 1090 and *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, and quotes excerpts from language contained in some of those opinions.

[2] It is true that there is language to this effect to be found in the opinions to which Mr. Roland refers (and there are others) but all of these authorities nonetheless recognize that state income taxes levied on interstate operations are indirect burdens which may, in certain instances, become a deterrent to the flow of

interstate commerce. What these cases stand for, as we shall hereinafter demonstrate, is that, while income taxes levied on net profits derived from interstate activities are indirect burdens, as distinguished from tax levies measured on gross receipts (see *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573, for example) which are direct burdens on such commerce, income taxes are not to be regarded, in the absence of action by Congress, either as a regulation of commerce or as burdening the free flow of commerce to such an extent as to be violative of the commerce clause of the Constitution or to deprive the taxpayers of due process under the Fourteenth Amendment, in instances where the activities of the taxpayers are deemed to have sufficient nexus with the taxing state.

Of the many matters presented to the Supreme Court concerning the unconstitutionality of state taxation of activities in interstate commerce, there is none in which the Court has ever suggested that Congress has not retained plenary power to regulate the activity by prohibiting the imposition of a state tax when it determines such tax to unduly burden the free flow of such commerce. Indeed, these cases are authority for holding that the Supreme Court has been able to act negatively only because Congress has not heretofore spoken.

As early as 1824, the Supreme Court in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23, recognized that the power to regulate commerce like all others vested in

Congress, "* * * is complete in itself, may be exercised to its utmost extent and acknowledges no limitations, other than are prescribed in the Constitution * * *."

In 1883 the Court stated in *Parkersburg & Ohio River Transportation Co. v. City of Parkersburg*, 107 U.S. 691, 701, 2 S.Ct. 732, 740, 27 L.Ed. 584, "It is the congress, and not the judicial department to which the constitution has given the power to regulate commerce * * * among the several states." And in the same case it was made clear that "In action by Congress" with respect to its regulatory powers "* * * is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it (Congress) sees fit to act, they may be regulated by state authority." (Word in parentheses ours)

As to taxation, Mr. Justice Jackson, concurring in *Northwest Airlines, Inc. v. State of Minnesota*, 322 U.S. 292, at 303, 304, 64 S.Ct. 950, at 956, 88 L.Ed. 1283, 153 A.L.R. 245, stated:

> "Congress has not extended its protection and control to the field of (state) taxation, although I take it no one denies that constitutionally it may do so. It may exact a single uniform federal tax on the property or the business to the exclusion of taxation by the states. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax-free altogether." (Word in parentheses ours).

See also *Freeman v. Hewit*, 329 U.S. 249, 67 S.Ct. 274,

91 L.Ed. 265,[4] and *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440.

One of the comprehensive statements of the role of the Supreme Court in determining whether particular state taxation operates to unduly burden interstate commerce is to be found in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 165, 74 S.Ct. 396, 400, 98 L.Ed. 583, where Mr. Justice Clark, as organ of the Court, observed:

> "* * * Under the Commerce Clause interstate commerce and its instrumentalities are not totally immune from state taxation, *absent action by Congress*. Frequently it has been said that interstate business must pay its way (citations omitted); and the Court has done more than pay lip service to this idea. Numerous cases have upheld state levies where it is thought that the tax does not operate to discriminate against commerce or unduly burden it either directly *or by the possibility of multiple taxation resulting from other taxes of the same sort being imposed by other states*. The recurring problem is to resolve a conflict between the Constitution's mandate that

[4] There, the Court stated: "The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. The task of scrutinizing is a task of drawing lines. This is the historic duty of the Court *so long as Congress does not undertake to make specific arrangements between the national government and the States in regard to revenue from interstate commerce.*" (Italics ours).

trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received. Some have thought that the wisest course would be for this Court to uphold all state taxes not patently discriminatory, *and wait for Congress to adjust conflicts when and as it wished.* But this view has not prevailed, *and the Court has therefore been forced to decide in many varied factual situations* whether the application of a given state tax to a given aspect of interstate activity violates the Commerce Clause. * * *"
(Italics and words in parentheses ours).

And in the recent Northwestern-Stockham cases, Justice Clark again remarked:

"Commerce between the States having grown up like Topsy, *the Congress meanwhile not having undertaken to regulate taxation of it,* and the States having understandably persisted in their efforts to get some return for the substantial benefits they have afforded it, there is little wonder that there has been no end of cases testing out state tax levies. * * *

"It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, *and its failure to act on the subject in the area of taxation* nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States. * * *" (Italics ours)

(3) The foregoing authorities of the Supreme Court, and there are many others, conclusively estab-

lish that, until Congress acts in the field of interstate commerce, the courts, perforce, are required to determine whether a particular state tax unconstitutionally burdens or affects the free flow of commerce. But, when Congress speaks, the right of the judiciary to determine whether the burden is undue or not is foreclosed.

What, then, is the effect of the failure of Congress to exercise its power to regulate state taxation affecting interstate activities for over 170 years? Counsel for one of the amici curiae says that Congress, by not legislating, has, in effect, forfeited its right to do so—at least, that it is bound by the pronouncements of the Supreme Court of the United States and cannot now take a different course of action in those areas of taxation which the Court has heretofore sanctioned.

[4, 5] We think that counsel is clearly in error—for once the power is given it continues as a legislative power and may be exerted at any time. Failure to act does not curtail or limit the power. Nor does the exertion of judicial power by negative action, which as we have shown, the Court was able to exercise only because Congress had not acted, create an estoppel against subsequent contrary legislative action.

[6] Since Congress has admittedly plenary power to regulate commerce, it follows, of course, that it had the power to find as a fact that enactment of P.L. 86-272 was essential to prevent an undue burden to the free flow of commerce between the states.

[7] The Collector, and the amici curiae supporting his position, take issue. They contend that Congress may not interfere with the taxing power of the States. This position, however, is founded on the predicate that the Act in question is not a regulation of commerce. But, here again, counsel err for the simple reason that Congress, having the power to regulate commerce, has the primary right to consider and determine whether the burden of the tax adversely affects interstate commerce and, if it finds that it does, to take such measures as it deems effective to suppress it. See *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, citing *Board of Trade of City of Chicago v. Olsen*, 262 U.S. 1, 43 S.Ct. 470, 67 L.Ed. 839 and *Stafford v. Wallace*, 258 U.S. 495, 42 S.Ct. 397, 66 L.Ed. 735, 23 A.L.R. 229.

In *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177, 189, 58 S.Ct. 510, 516, 82 L.Ed. 734, the Court said:

> "Congress, in the exercise of its plenary power to regulate interstate commerce, *may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the congressional judgment of what is appropriate regulation of interstate commerce,* and the extent to which, in that field, state power

and local interest should be required to yield to the national authority and interest." (Italics ours).

To the same effect is *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 and *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421, 15 L.Ed. 435.

In the instant case, although it was professed by counsel aligned with the Collector that P.L. 86-272 was not given careful consideration and was rushed through to final passage during the last days of the Session of the 86th Congress, it appears from the record that various Committees handling the legislation held a number of hearings and considered all of the pros and cons concerning the legislation. After due deliberation, these Committees concluded that the uncertainty of interstate tax liability and inevitable new reporting, accounting and tax costs presented a real threat which was inducing retreat of business from the free markets and the deprivation of consumer goods and services to the detriment of the American economy. See State and Local Tax Report No. 22, Sec. 2, page 4. The report of the Senate Finance Committee states:

> "Your committee has been increasingly concerned with the growing complexity of the tax structures devised by the several levels of government. * * * This lack of coordination and uniformity has resulted in the creation of sprawling diverse revenue systems with underlying potential for great harm for the economy of the country and to the individual taxpayers to such an extent that urgent remedial action appears necessary.

"Repeated efforts over the years, in the form of advisory commissions and committees, have failed to satisfactorily resolve the current tax dilemma, * * *

"The duplication and, indeed, the triplication in the field of income taxation, requires that prompt attention be given to the dangers inherent in the widespread exploitation of tax sources among the governmental levels."

[8] The judiciary is neither concerned with the wisdom of a law nor whether the means of regulation chosen are reasonably adapted to the end sought. Courts do not sit as legislatures and do not have the facilities available to Congress for weighing all conflicting interests, State and National, in determining when and how much the State regulatory power shall yield to the larger interest of a national commerce. See *South Carolina Highway Department v. Barnwell Bros., supra.* When the action of Congress is within the scope of its power, fairly debatable questions as to the reasonableness, wisdom and propriety of the legislation is not for the determination of the courts but for the legislative body on which rests the duty and responsibility of these decisions.

[9-11] Congress, by P.L. 86-272, has found as a fact that an undue burden was placed on interstate commerce by the action of 35 states in enacting various income tax statutes when applied to the situation here presented—that is, the sending of salesmen into the several states to secure orders for goods which were to be shipped in interstate commerce. This find-

ing, we think, furnishes a full answer to the final contention of counsel aligned with the Collector—that is, that the law is patently discriminatory against local or intrastate business concerns because it employs distinctions without substance which result in unconstitutional classifications prohibited by the due process clause of the Fifth Amendment to the Federal Constitution.[5]

We conclude that the statute in question is a proper exercise of the plenary power of Congress over commerce and that the State law must yield insofar as it is sought to be applied to the activities involved herein.

The judgment of the district court is affirmed.

HAMITER, J., concurs in the result.

[5] Indeed, it may well be doubted that the parties here are entitled to raise this question. The rights protected by the Fifth Amendment are in favor of persons, not States, and the alleged injured firms are not parties to the litigation.

APPENDIX C

Pertinent provisions of the Louisiana Income Tax Law (Title 47 of the La. Revised Statutes of 1950 relating to foreign corporations.

SUB-PART B. TAX LEVY; RATES OF TAX

§ 31. Individuals and corporations subject to tax

There shall be levied, collected, and paid for each taxable year a tax upon the net income of residents and nonresidents, estates, trusts, domestic and foreign corporations, as hereinafter provided.

* * *

(3) **Domestic corporations.** Domestic corporations shall be taxed on net income from whatever source derived, except as hereinafter exempted.

(4) **Foreign corporations.** Foreign corporations shall be taxed on net income from sources within the state, as hereinafter set out.

* * *

§ 32. Rates of tax

* * *

C. On corporations. The tax to be assessed, levied, collected and paid, upon the net income of every corporation in excess of that portion of three thousand dollars which the net income of the corporation taxable under this Chapter bears to the total net income of such corporation shall be computed as follows, viz:

Four per centum upon the amount of said net income. As amended Acts 1950, No. 445, § 1.

* * *

SUB-PART C. COMPUTATION OF NET INCOME

§ 41. Net income

"Net income" means the gross income computed under R.S. 47:42 through 47:53, less the deductions allowed by R.S. 47:54 through 47:77.

* * *

SUB-PART D. ACCOUNTING PERIODS AND METHODS OF ACCOUNTING

§ 91. General rules

The net income shall be computed upon the basis of the taxpayer's annual accounting period, fical year or calendar year, as the case may be, in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the collector does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in R.S. 47:98 or if the taxpayer has no annual accounting period or does not keep books the net income shall be computed on the basis of the calendar year.

* * *

§ 98. Definitions

When used in this Chapter:

(1) "Taxable year" means the calendar year, or the fiscal year ending during such calendar year,

upon the basis of which the net income is computed under this Chapter. "Taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this Chapter or under regulations prescribed by the collector, the period for which return is made. The first tax as levied in this Chapter shall be for taxable years beginning after December 31, 1949, and shall be due in each case on the day next following the last day of each taxable year; and such tax shall be due annually thereafter, computed in each instance upon the net income of the calendar or fiscal year ended last preceding the date when the tax is due according to this Section. Due return and payment thereof shall be made as is elsewhere provided in this Chapter.

(2) "Fiscal year" means an accounting period of twelve months ending on the last day of any month other than December. However, no fiscal year will be recognized unless, before its close, it was definitely established as an accounting period by the taxpayer, and the books of such taxpayer were kept in accordance therewith; and no accounting period shall be changed without the approval of the collector.

(3) "Paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Chapter.

* * *

§ 102. Corporation returns

Every corporation subject to taxation under this Chapter shall make a return, stating, specifically, the items of its gross income and the deductions and

credits allowed under this Chapter. The returns shall contain or be verified by a written declaration by the president, vice-president, or other principal officer and by the treasurer or assistant treasurer that it is made under the penalties imposed for filing false reports, stating specifically the items of its gross income and the deductions and credits allowed under this Chapter, the return to be prepared in accordance with regulations as prescribed by the collector. In case where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control. As amended Acts 1950, No. 445, § 1.

* * *

§ 161. Income from sources partly within and partly without the State of Louisiana

* * *

B. **Nonresident individuals, and foreign corporations.** In the case of a nonresident individual or foreign corporation, items of gross income, expenses, losses and deductions, from whatever source received or incurred, not otherwise exempted by this Chapter, shall be included in the taxpayer's return; but, for the purpose of this Chapter, the amount of tax shall be

computed only upon the net income earned within or derived from sources within this state, such net income to be computed as provided in Sub-part F of Part II of this Chapter.

* * *

SUB-PART F. NONRESIDENT INDIVIDUALS AND FOREIGN CORPORATIONS

§ 241. Net income subject to tax

The net income of a nonresident individual or foreign corporation subject to the tax imposed by this Chapter shall be the sum of the net allocable income earned within or derived from sources within this state, as defined in R.S. 47:243, and the net apportionable income derived from sources in this state, as defined in R.S. 47:244, less the amount of federal income taxes attributable to the net allocable income and net apportionable income derived from sources in this state. The amount of federal income taxes to be so deducted shall be that portion of the total federal income tax which is levied with respect to the particular income derived from sources in this state to be computed in accordance with rules and regulations of the collector of revenue. Proper adjustment shall be made for the actual tax rates applying to different classes of income and for all differences in the computation of net income for purposes of federal income taxation as compared to the computation of net income under this Chapter. Where the allocation of the tax is to be based on a ratio of the amount of net income from sources in Louisiana to the amount of total net income of a particular class, both the numerator and the denominator of the fraction used

in determining the ratio shall be computed on the basis that such net income is determined for federal income tax purposes. As amended Acts 1950, No. 445, § 1.

* * *

§ 242. Segregation of items of gross income

All items of gross income, not otherwise exempted in this Chapter, shall be segregated into two general classes.

(1) The class of gross income to be designated as "allocable income" shall include only the following:

(a) rents and royalties from immovable or corporeal movable property;

(b) profits from sales or exchanges of property (including such items as stocks, bonds, notes, land, machinery, mineral rights) not made in the regular course of business,

(c) interest income;

(d) dividends from corporate stock;

(e) royalties or similar revenue from the use of patents, trade marks, copyrights, secret processes, and other similar intangible rights;

(f) income from estates, trusts and partnerships;

(g) salaries, wages or other compensation received by a nonresident individual for personal services;

(h) income from construction, repair, or other similar services.

(2) The class of income to be designated as "apportionable income" shall include all items of gross income which are not properly includible in allocable income as defined in this Section. As amended Acts 1958, No. 170, § 1.

* * *

§ 243. Computation of net allocable income from Louisiana sources

Items of gross allocable income shall be allocated directly to the states from which such items of income are derived, as set forth in this Section.

(1) Rents and royalties from immovable or corporeal movable property, and profits from sales and exchanges of capital assets consisting of immovable or corporeal movable property, shall be allocated to the state where such property is located at the time the income is derived.

(2) Interest on customers' notes and accounts shall be allocated to the state in which such customers are located.

(3) Profits from sales or exchanges not made in the regular course of business, of property, other than capital assets consisting of incorporeal property or rights, shall be allocated to the state where such property is located at the time of the sale. A mineral lease, royalty interest, oil payment or other mineral interest shall be located in the state in which the property subject to such mineral interest is situated.

(4) Other interest, dividends, and profits from sales and exchanges of capital assets consisting of incorporeal property or rights, shall be allocated to the state in which the securities or credits producing such income have their situs, which shall be at the business situs of such securities or credits, if they have been so used in connection with the taxpayer's business as to acquire a business situs, or, in the absence of such a business situs, shall be at the legal domicile of the taxpayer in the case of an individual or at

the commercial domicile of the taxpayer in the case of a corporation; provided that dividends upon stock having a situs in Louisiana received by a corporation from another corporation which is controlled by the former, through ownership of 50% or more of the voting stock of the latter, shall be allocated to the state or states in which is earned the income from which the dividends are paid, such allocation to be made in proportion to the respective amounts of such income earned in each state; and provided further that interest on securities and credits having a situs in Louisiana received by a corporation from another corporation which is controlled by the former through ownership of 50% or more of the voting stock of the latter, shall be allocated to the state or states in which the real and tangible personal property of the controlled corporation is located, on the basis of the ratio of the value of such property located in Louisiana to the total value of such property within and without the state.

(5) Royalties or similar revenue from the use of patents, trade marks, copyrights, secret processes and other similar intangible rights shall be allocated to the state or states in which such rights are used.

(6) Estates, trusts, and partnerships having a non-resident individual or foreign corporation as a member or b ıeficiary shall allocate and apportion their income within and without this state in accordance with the processes and formulas prescribed in this part, and the share of any such non-resident or foreign corporation member or beneficiary in the net income from sources in this state as so computed, shall be allocated

to this state in the return of such member or beneficiary.

(7) Salaries, wages, and other compensation received by a nonresident individual for personal services shall be allocated to the state or states in which the services were rendered; and in the case of services rendered partly within and partly without this state, the allocation shall be made on the basis of the amount of time the taxpayer was employed within and without this state.

(8) Income from construction, repair, or other similar services shall be allocated to the state in which the work is done.

From the gross allocable income allocated to this state there shall be deducted all expenses, leases, and other deductions, except federal income taxes, allowable under this Chapter which are directly attributable to such income allocated to this state; and there shall also be deducted a ratable portion of allowable deductions, except federal income taxes, which are not directly attributable to any item or class of gross income.

The difference between the gross income allocated to this state and the deductions allocated and prorated thereto in accordance with the provisions of this Section shall be the net allocable income (or less) earned within or derived from sources within this state. As amended Acts 1958, No. 170, § 2.

* * *

§ 244. Computation of net apportionable income from Louisiana sources

From the total gross apportionable income, as provided in R.S. 47:242-(2), there shall be deducted all expenses, losses, and other deductions except federal income taxes, allowable under this Chapter, which are directly attributable to such income; and there shall also be deducted a ratable portion of allowable deductions, except federal income taxes, which are not directly attributable to any item or class of gross income. The remainder shall be the total net apportionable income (or loss).

The net apportionable income derived from sources in this state shall be computed by multiplying the total net apportionable income by the Louisiana apportionment per cent determined in accordance with the provisions of R.S. 47:245.

In lieu of the apportionment as provided in this Section, a taxpayer may apply to the collector for permission to compute the net apportionable income derived from sources in this state by means of the separate accounting method. The collector shall grant such permission if the taxpayer shows that the apportionment method produces a manifestly unfair result, and that the unit of the taxpayer's business operating in this state could be successfully operated independently of the units in other states, and makes all of its sales in this state or derives all of its gross revenues from sources in this state, and any merchandise or products sold by the unit in this state are either:

(1) Produced by the taxpayer in Louisiana,

(2) Purchased by the taxpayer from non-affiliated sources within or without this state,

(3) Purchased from an affiliated source at not more than the price at which similar merchandise or products in similar quantities could be purchased from non-affiliated sources, or

(4) Transferred from another department of the taxpayer's business at not more than the actual cost to the taxpayer; or where it is otherwise shown to the satisfaction of the collector that the apportionment method produces a manifestly unfair result and that the separate accounting method produces a fair and equitable determination of the amount of net income taxable in this state.

If such permission is granted by the collector, the taxpayer shall compute the net apportionable income derived from sources in this state by means of a separate accounting method which shall comply with the regulations to be prescribed by the collector. When a taxpayer has secured permission to employ the separate accounting method, a change to the method of apportionment shall not be made for any subsequent year without securing the permission of the collector.

When the collector finds that the use of the apportionment method by a taxpayer produces a manifestly unfair result and that the separate accounting method would more equitably determine the amount of net income derived from sources in Louisiana, he may require that the separate accounting method be used in such case.

Whenever there shall be a contest between the taxpayer and the collector as to whether the separate accounting method or the apportionment method should be used, the burden shall be upon him who urges the use of the separate accounting method to show that the apportionment method produces a manifestly unfair result. As amended Acts 1950, No. 445, § 1.

* * *

§ 245. Determination of Louisiana apportionment percent

* * *

F. **Manufacturing, merchandising, and other business.** The Louisiana apportionment percent of any taxpayer whose net apportionable income is derived primarily from a business or manufacturing or merchandising or from any other business not included in Subsection A through E of this Section shall be the arithmetical average of three ratios, as follows:

(1) The ratio of the value of the immovable and corporeal movable property owned by the taxpayer and located in Louisiana, to the value of all immovable and corporeal movable property owned by the taxpayer and used in the production of the net apportionable income;

(2) The ratio of the amount paid by the taxpayer or salaries, wages, and other compensation for personal services rendered in this state, to the total amount paid by the taxpayer for salaries, wages, and other compensation for personal services in connection with the production of net apportionable income; and

(3) The ratio of net sales made in the regular course of business and other gross apportionable income attributable to this state to the total net sales made in the regular course of business and other gross apportionable income of the taxpayer.

For the purpose of this Subsection sales attributable to this state shall be all sales where the goods, merchandise or property is received in this state by the purchaser. In the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place at which the goods are ultimately received after all transportation has been completed shall be considered as the place at which the goods are received by the purchaser. However, direct delivery into this state by the taxpayer to a person or firm designated by a purchaser from within or without the state shall constitute delivery to the purchaser in this state.

For the purpose of this Subsection, salaries, wages, and other compensation for personal services paid by a taxpayer whose principal office is located in Louisiana, to officers and employees responsible for the direction and supervision of operations of the taxpayer partly within and partly without Louisiana, and salaries, wages, and other compensation or personal services paid to general office employees whose duties pertain to the operations of the taxpayer partly within and partly without Louisiana, shall be allocated in part to this state on the basis of the ratio of the amount of direct operating salaries, wages, and other compensation for services rendered in Louisiana to the total of such direct operating salaries, wages,

and other compensation paid in connection with the production of net apportionable income.

For the purpose of this Subsection gross apportionable income attributable to this state derived from the t ansportation of crude petroleum, natural gas, petroleum products or other commodities for others through pipelines shall include all gross revenue derived from operations entirely within this state plus a portion of any revenue from operations partly within and partly without this state, based upon the ratio of the number of units of transportation service performed in Louisiana in connection with such revenue to the total of such units. A unit of transportation service shall be the transporting of any designated quantity of crude petroleum, natural gas, petroleum products or other commodities for any designated distance. All other classes of gross apportionable income shall be prorated within or without this state on the basis of such ratio or ratios, prescribed by the collector, as may be reasonably applicable to the type of business involved. As amended Acts 1958, No. 170, § 3.

CERTIFICATE

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Baton Rouge, Louisiana, this day_____of August, 1964.

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No. 429

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

ASHTON J. MOUTON, COLLECTOR OF REVENUE STATE OF LOUISIANA, Petitioner,

v.

INTERNATIONAL SHOE COMPANY, Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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INTERNATIONAL SHOE COMPANY, Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

The purpose of this brief is to support the position of the Collector of Revenue of the State of Louisiana that the matter involves issues of great fundamental importance which have not as yet been resolved by this Court.

The constitutionality of Public Law 86-272[1] affects vital interests of all the states of the Union, their political subdivisions, and all segments of the business community. The issues pertaining to the constitutionality of Public Law 86-272 involve considerations which have never before been the subject of adjudication by this Court.

Congress has never before attempted to override judicial precedent as to what constitutes a regulation of interstate

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[1] 73 Stat 555, 556 (1959), 15 U.S.C. 381-384.

commerce, nor has it ever before tried to restrict a state's power to tax instate activities and sources.

The great fundamental issue which Public Law 86-272-type legislation raises is whether the Congress possesses the same power to prohibit all state taxation of businesses whose activities affect interstate commerce which it has to regulate all such businesses. This congressional prohibition portends a new and unpromising era in federal-state relations in the field of taxation. Heretofore, a state has had the power to impose its taxes upon a firm engaged in multistate operations within its borders, unless the application of the tax to the firm imposed an undue burden on or discriminated against interstate commerce.

Public Law 86-272 abandons this fundamental adjustment between national and state power and submits therefor the radical rule that no state tax can stand against federal prohibition insofar as it applies to any business affecting interstate commerce. The constitutional and political impact of such legislative theory is radical in the extreme. It presumes that state and local taxing jurisdiction with regard to virtually all nonresidents and foreign corporations can be taken away by a transient majority of the Congress.

Not only does Public Law 86-272 support the notion that the Congress has this prohibitive power, but it also supports the notion that it can be exercised by the Congress in an arbitrary and capricious manner, without adjusting such legislation to the judicial pronouncements of this Court as to what constitutes congressional power over interstate commerce, and to the practical realities of the business community. It thereby fosters discrimination, as between those segments of the business community that can qualify for the arbitrary immunity granted by Public Law 86-272

and those that cannot, by the utilization of distinctions without substance.

Although Public Law 86-272 ostensibly purports to regulate commerce among the several states in response to dicta of this Court, it does not implement any broad public policy considerations for uniform taxation of interstate commerce. Its subject matter is solely restrictive legislation on the power of the states to subject to nondiscriminatory income taxation properly apportioned net income derived from sources and activities taking place in more than one state. It defines the jurisdictional prerequisites for the imposition of such a tax contrary to those which have been emphatically set forth by this Court. Public Law 86-272 employs distinctions that this Court has found to be without substance and thus of no constitutional significance. It was enacted for the sole purpose of limiting the scope of the decisions of this Court which uphold a state's power to tax net income derived from sources and activities attributable to the taxing state.

Public Law 86-272 was hurriedly enacted by Congress after limited hearings before the Select Committee on Small Business of the United States Senate[2] and the Committee on Finance of the United States Senate.[3] It not only defined the above referred to jurisdictional prerequisites, but also made provision for congressional study of the problem

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[2]

"State Taxation on Interstate Commerce—1959", Hearing before the Select Committee on Small Business, United States Senate, Eighty-Sixth Congress, First Session, April 8, 1959, Part 1; May 1, 1958, Boston, Mass., Part 2; and June 19, 1959, Part 3.

[3]

"State Taxation of Interstate Commerce", Hearings before the Committee on Finance, United States Senate, Eighty-Sixth Congress, First Session, July 21 and 22, 1959.

of state taxation of interstate commerce. This constitutional authorization has led to the creation of a Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives, which has conducted hearings on various aspects of the problems. The first series of hearings took place December 4 through 8, and December 11 through 13, inclusive, 1961.[4]

On June 15, 1964, this Special Subcommittee issued the first two volumes of its report.[5] Much of the material in these volumes indicate the continued existence of the problems involved in the state taxation of interstate commerce and note the artificial and limited scope of the provisions of Public Law 86-272.

Not only is the subject matter of the report involved in the present action, but it is also involved in *The State of Missouri ex. rel. Ciba Pharmaceutical Products, Inc.* v. *The State Tax Commission of Missouri,* now pending in the Supreme Court of Missouri,[6] and in *Smith, Kline & French Laboratories* v. *State Tax Commission,* Oregon Tax Court No. 44, decided April 24, 1964 (which decision has been appealed to the Oregon Supreme Court).

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[4]

"State Income Taxation of Mercantile and Manufacturing Corporations", Hearings before the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives, Eighty-Seventh Congress, First Session, December 4, 5, 6, 7, 8, 11, 12 and 13, 1961, Serial No. 20.

[5]

"State Taxation of Interstate Commerce", Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives, Pursuant to Public Law 86-272, as Amended, Volumes 1 and 2.

[6]

No. 50015 September Session 1963.

The validity of such legislation hinges upon the interpretation of those constitutional provisions specifically set forth in the Petition for Writ of Certiorari (pages 6-11), and the Fifth Amendment,[7] which contains due process of law restrictions on congressional action.

The decision of the Oregon Tax Court in *Smith, Kline & French Laboratories, supra,* contains a well-reasoned analysis pertaining to the unconstitutionality of Public Law 86-272. This decision is incorporated here as a statement representative of the position of the states and local based businesses. [8] The Oregon Tax Court found it unnecessary to analyze the discrimination question posed by Public Law 86-272 because of its prior conclusion that Congress, by enactment of Public Law 86-272, was, by its own fiat, attempting to enlarge its jurisdiction under the Constitution and to place itself above both the Constitution and this Court.

Amici curiae concur with the argument set forth in the Petition for Writ of Certiorari of the Collector of Revenue of the State of Louisiana.

We respectfully submit that the question at issue is undoubtedly one of the most fundamental constitutional questions of this century. It is of vital interest to the several states and to their political subdivisions, inasmuch as Public Law 86-272 restricts an attribute of their sovereignty, namely, the power to levy and collect taxes on activities and

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[7] Art V, U. S. Const.

[8] See Addendum to this brief.

events that take place within their respective jurisdictions, which power is vital to the discharge of their governmental functions and which has never been challenged heretofore by the Congress.

The continued existence and the general welfare of the several states, their agencies or instrumentalities, and their local governmental units, are dependent upon the power and jurisdiction to levy nondiscriminatory taxes on the property, activities and events that take place within their respective jurisdictions; and, therefore, the constitutionality of any legislation that would restrict or narrow this jurisdiction—thereby granting preferential tax treatment to a segment of the business community—is of prime and immediate importance to the several states, particularly to those that impose income taxes on multistate businesses as a recompense for the benefits conferred.

Amici curiae submit that Public Law 86-272 is unconstitutional for the following reasons:

1. It patently and unreasonably discriminates against that portion of the busines. community that is not granted immunity from state taxation, and does not alleviate the alleged high compliance costs and multiple tax burdens which it is contended are incurred by multistate firms who are granted the preferential immunity, such alleged burdens being the only constitutional justification for this legislation.

2. It employs distinctions without substance under modern business practices which have been abandoned and disapproved by this Court in determining the constitutionality of the states' power to tax multistate businesses. It would grant immunity on considerations of form, rather

than substance, which have been specifically rejected as relevant criteria by this Court in

Northwestern States Portland Cement Co. v. *Minnesota and Williams* v. *Stockham Valves & Fittings, Inc.*, 358 US 450,

Scripto v. *Carson*, 362 US 207,

General Motors Corporation v. *Washington, et al.*, 377 US 436,

and cases of like import.

3. Under the guise of the power of Congress to regulate interstate commerce, Public Law 86-272 curtails the jurisdiction of the states to levy and collect nondiscriminatory, duly apportioned taxes which do not impose any undue burden on interstate commerce and which in no sense constitute regulation of such commerce.

4. It conflicts with the powers reserved to the states to levy and collect taxes for state and local governmental purposes.

5. It is an effort on the part of the Congress to take over the functions of the judiciary to determine what constitutes interstate commerce and what constitutes intrastate business activities for commerce clause purposes.

WHEREFORE, it is respectfully submitted that the Honorable Supreme Court of the United States grant the Prayer of Ashton J. Mouton, Collector of Revenue of the State of Louisiana, as set forth in his Petition for Writ

of Certiorari to the Supreme Court of the State of Louisiana.

Respectfully submitted,

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ADDENDUM

IN THE OREGON TAX COURT

Corporate Income Tax

No. 44

SMITH, KLINE & FRENCH LABORATORIES, Plaintiff, v. STATE TAX COMMISSION, Defendant.	

DECISION

This is a suit to set aside defendant's assessment of corporation income tax against plaintiff for the years 1955, 1956, 1957, and 1958 on the ground that Public Law 86-272 prohibits Oregon from imposing such tax on plaintiff.

Facts

The parties stipulated that the material facts of the case are substantially as follows:

Plaintiff, a Pennsylvania corporation, has its principal office in Philadelphia. It manufactures and sells ethical pharmaceutical products in interstate commerce. In Oregon it has no office, no office equipment, no stock of goods, no

telephone listing, no telephone answering service, no mailing address, and no automobile. To conduct its only activity in Oregon, plaintiff employs five or six resident professional representatives, so-called "detail men." It reimburses these representatives for the use of their own cars and other expenses and provides them with samples and sales materials.

Under supervision of its Seattle office, plaintiff's detail men visit hospitals, other institutions, doctors, and retail druggists, as well as wholesalers handling plaintiff's products, for the purpose of explaining the use and usefulness of plaintiff's products and encouraging their use and sale. They do not solicit orders (except upon rare occasions) but rather promote the use of plaintiff's products. The detail men report daily to plaintiff concerning the professional reception of its products. No telephone listing of the representatives identifies them as plaintiff's agents, though their business cards carry their home telephone numbers. At their homes the detail men maintain stocks of samples for use in their promotional work.

Among ultimate users only state institutions deal directly with plaintiff. All other ultimate users purchase from retailers. Retailers, in turn, purchase from wholesalers, whose salesmen solicit orders from druggists, hospitals, and institutions. Oregon wholesalers place orders with plaintiff at its principal office, where they are accepted.

In 1958, defendant requested that plaintiff pay Oregon's corporation net income tax for the years 1955 through 1958 under the Oregon Corporation Income Tax Act of 1955. In May of that year, plaintiff filed its returns and paid tax for those four years. It computed its tax by the three-factor apportionment formula with zero as its Oregon sales and property factors. In August, 1959, defendant issued pro-

posed deficiency assessments in which it recomputed plaintiff's tax, using the three-factor formula with a zero factor for property only. In September, 1959, Congress passed P.L. 86-272. Defendant made its assessments final in August, 1960. In September, 1960, plaintiff formally appealed to defendant to set aside its assessments and to refund the tax already paid on the ground that P.L. 86-272 exempted plaintiff from Oregon corporate income taxation. After a formal hearing in 1962, defendant, in its opinion and Order No. I-62-14, affirmed its assessments and denied plaintiff's refund claims because plaintiff's activities in Oregon did not bring plaintiff within the exemption provided by P.L. 86-272.

Plaintiff then filed its complaint in this court to set aside the commission's order and assessment. In its answer, defendant raised for the first time the additional issue that P.L. 86-272 is unconstitutional. After plaintiff replied, defendant requested, under ORS 305.425, that this court remand the case to the tax commission for its formal consideration of the constitutional issue. Plaintiff informally acquiesced in the remand. This court remanded the case to the commission but retained jurisdiction to proceed without the filing of new pleadings. Thereafter, by its Opinion and Order No. I-63-19, the commission held P.L. 86-272 unconstitutional.

The parties then submitted the case upon a detailed stipulation of all material facts. The court allowed the states of Michigan and Missouri to intervene amici curiae, and plaintiff, defendant, and the State of Michigan exhaustively briefed the issues presented.

Issues

This case presents three issues:

(1) Did plaintiff's activities in Oregon bring it within the exemption of P.L. 86-272?

(2) Is P.L. 86-272 constitutional?

(3) If the statute is constitutional, from how much of the tax paid and proposed is plaintiff exempt?

P.L. 86-272 prohibits the states from levying and collecting taxes measured by net income from natural and artificial persons engaged in interstate commerce whose only business activity within the taxing state is the solicitation of orders for the sale of tangible personal property by either the soliciting firm or a customer of the soliciting firm, when any orders thereby obtained are accepted and filled outside the taxing state. This prohibition is applicable after the adoption of the act in September, 1959, and to assessments then pending.

Background of Legislation

This federal act culminates a lengthy and often heated controversy between the states and multi-state business concerns, most of which are corporations. In Oregon and many other states, state corporate taxation measured by net income began with an excise tax upon the right to engage in business within the state. As commerce became more national in character, many companies engaged in commerce through various states but not within those various states on an intrastate basis. In 1951, the United

States Supreme Court struck down, as unconstitutional, a corporate excise tax upon wholly interstate commerce beginning in, passing through, or ending in the taxing state. *Spector Motor Service, Inc. v. O'Connor,* 340 US 602, 71 S Ct 508, 95 L ed 573 (1951). That case held a corporate excise tax unconstitutional as an undue burden upon interstate commerce, because it was imposed on the right to do business in interstate commerce.

After that decision, many states enacted corporation income tax acts which imposed a tax upon the realization of net income by a corporate taxpayer engaged in interstate commerce and not upon a taxpayer's right or privilege to conduct its interstate business. In order to avoid any question under the equal protection clause of the Federal Constitution, these states made the rates and incidents of their corporation net income taxes identical with those of their corporation excise taxes, which were still applicable to corporations authorized to do business within their boundaries.

In February, 1959, the United States Supreme Court held the corporate net income tax to be constitutional under both the commerce clause and the due process clause of the Federal Constitution. *Northwestern States Portland Cement Co. v. Minnesota and Williams v. Stockham Valves & Fittings, Inc.,* 358 US 450, 79 S Ct 357, 3 L ed2d 421, 67 ALR2d 1292 (1959). Immediately, corporations engaged in interstate commerce sought Congressional action to defeat the application of the Supreme Court decision. In September, 1959, after hurried consideration of this complex problem, Congress enacted P.L. 86-272.

First Issue: Construction of P.L. 86-272

In making its assessments, defendant strictly construed the exemption granted by P.L. 86-272 and found that plaintiff's Oregon activities are not that solicitation of orders which the statute exempts. Defendant contends that P.L. 86-272 creates an "island of immunity" around the solicitation activities expressly described in the statute; that solicitation of orders requires that an actual order be sought by an individual calling upon a potential customer; and that the activities of plaintiff's employees, which merely encouraged the placing of orders with the wholesale drug firms selling plaintiff's products, do not qualify plaintiff for exemption.

On the other hand, plaintiff contends that the act is properly construed as a "minimum activity" statute—that it exempts all corporations the activities of which do not exceed solicitation of orders. Furthermore, plaintiff contends that its Oregon employees do solicit orders for plaintiff's customers within the meaning of P.L. 86-272 and that the statute does not require the receipt of an order by plaintiff's employees so long as they are soliciting and encouraging the purchase of plaintiff's products.

In this court's opinion, plaintiff's activities in Oregon meet the statutory requirements for exemption. Congressional committee reports support this conclusion. Conference Report No. 1103, 86th Cong., 1st Sess. (1959); Select Committee on Small Business, *The Problems Faced by Small Business in Complying with Multi-State Taxation of Income Derived From Interstate Commerce*, S. Rep. No. 453, 86th Cong., 1st Sess. (1959) p 13; Comm. on Finance, *State Taxation of Income Derived From Interstate Commerce*, S. Rep. No. 658, 86th Cong., 1st Sess. (1959). These

reports show that Congress intended to exempt not only the specifically described phase of interstate sales efforts but also all lesser, included phases.

Furthermore, the nature of plaintiff's business makes its activities in Oregon the equivalent of solicitation of orders in other, less technical bus nesses. Ethical drugs are generally purchased by the public from retail druggists. But the drug to be purchased is selected, not by the purchaser, but by his physician. An ethical drug sales effort comparable to direct solicitation of orders for shoes, valves, or cement requires "selling" the physician on the wisdom of prescribing the particular product for his patient. By soliciting the stocking of plaintiff's products by druggists and the prescription of those drugs by physicians, plaintiff's detail men perform the same sales function in plaintiff's field that salesmen soliciting actual orders from the ultimate user perform in other businesses. A realistic legal and factual interpretation of P.L. 86-272 requires exemption of plaintiff from Oregon corporation income tax.

Second Issue: Due Process

Based upon its second Opinion and Order, defendant's answer presents the basic, constitutional issues under the commerce and due process clauses of the Federal Constitution. P.L. 86-272 prohibits state income taxation of certain businesses in inter-state commerce categorized by the extent of their activity within the taxing state. The same extent of activity also establishes the requisite connection, or "nexus," between the taxpayer and the taxing state to support such taxation under the federal due process clause. Since P.L. 86-272 prohibits taxation where this nexus alone, exists, defendant contends that P.L. 86-272 is an attempt by Congress to regulate due process, not interstate commerce.

Due process is a judicial concept. Ultimate determination of due process is a judicial, not a legislative, task. *State Board of Insurance v. Todd Shipyards Corp.*, 370 US 451, 457, 82 S Ct 1380, 8 L ed2d 620, 625 (1962). See also concurring opinion of Mr. Justice Douglas in *Brainiff Airways v. Nebraska State Board of Equalization and Assessment*, 347 US 590, 603, 74 S Ct 757, 98 L ed 967, 979 (1954). Legislatures frequently violate due process. Were the courts not vested with ultimate determination of due process, "legislative judgments, decrees, and forfeitures in all possbile forms, would be the law of the land." Daniel Webster's analysis adopted in *Dartmouth College v. Woodward*, 65 NH 473, 614 (1817), case also reported at 1 NH 111. The Supreme Court has already held that solicitation of orders within a state establishes sufficient nexus to support the due process of that state's net income taxation. *Northwestern States—Stockham, supra; Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La. 651, 101 S2d 70 (1958), cert. den., 359 US 28, 79 S Ct 602, 3 L ed2d 625 (1959); *International Shoe Co. v. Fontenot*, 236 La. 279, 107 S2d 640 (1958), cert. den., 359 US 984, 79 S Ct 943, 3 L ed2d 933 (1959). Congress cannot legislatively overrule the Supreme Court's determination of due process.

However, in P.L. 86-272 Congress does not attempt to alter any due process concept or to determine what is sufficient nexus to support Oregon's income tax. Instead it uses what is basically a due process concept as a standard in attempting to regulate interstate commerce. It defines the corporations which it seeks to protect in terms usually employed in due process determinations. Then, it uses this due process concept, not to determine due process, but to limit its regulation of interstate commerce. Such use of the due process concept as a definition in P.L. 86-272 is not an

unconstitutional attempt by Congress to regulate due process.

This court's determination that plaintiff is entitled to the exemption of P.L. 86-272 and that the statute does not attempt to regulate due process squarely presents the issue of whether P.L. 86-272 is a constitutional exercise of Congressional power to regulate interstate commerce.

Second Issue: Interstate Commerce

Plaintiff contends that the statute is constitutional. It relies on the decision of Judge Fred A. Blanche, of the 19th Judicial District Court, Parish of East Baton Rouge, Louisiana, who held P.L. 86-272 constitutional on July 12, 1963, in *International Shoe Co. v. Collector of Revenue,* (1 CCH Louisiana Tax Cases, ¶ 200-227). A fortnight ago, on March 30, 1964, the Louisiana Supreme Court affirmed this decision in an opinion by Mr. Justice McCaleb. *International Shoe Company v. Cocreham,* ____ La. ____, ____ S2d ____ (1964). Plaintiff also cites such eminent authorities as Professor Jerome R. Hellerstein, whose position the Louisiana Supreme Court substantially adopted. See Hellerstein, "The Power of Congress to Restrict State Taxation of Interstate Commerce," 12 J. Taxation 302 (1960); Hellerstein, "An Academician's View of State Taxation of Interstate Commerce," 16 Tax L. Rev. 159 (1961). Plaintiff's rationale is (1) that Congress has unlimited power to regulate interstate commerce under the commerce clause and to decree what burden states may place on this commerce; (2) that an income tax levied on corporations in interstate commerce is a burden on interstate commerce; (3) that the Supreme Court's determination in *Northwestern States—Stockham* that a state income tax was not an undue burden on interstate commerce applies only in the absence of Con-

gressional action; and therefore, (4) that Congress has the power to prohibit state taxation of this commerce, whether or not the taxation which it prohibits is valid in the absence of Congressional action.

Defendant finds P.L. 86-272 unconstitutional. It contends that net income taxation is not a burden on interstate commerce because, by the time that the income tax is imposed on the net profits, these profits are no longer within interstate commerce. It also contends that the exemption from state taxation at the net income level provided in P.L. 86-272 violates the due process clause of the Fifth Amendment of the Federal Constitution.

These positions have been ably and exhaustively briefed in this court. In these briefs, the articles of Professor Hellerstein, Mr. Cox, and others, and the decisions of Judge Blanche and Mr. Justice McCaleb in Louisiana, as well as in prior United States Supreme Court decisions themselves, this court finds ample quotations from Supreme Court decisions to support both positions. Referring to this plethora of quotations, Mr. Justice Frankfurter said: "To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future." *Freeman v. Hewitt*, 329 US 249, 252, 67 S Ct 274, 91 L ed 265, 271 (1946). Therefore, this court must reach the jugular of this case by reasoning from cases rather than quotations, by finding substantial, rather than formal, distinctions, and by seeking to understand and weigh the basic policies underlying conflicting constitutional concepts.

Article I, Section 8, of the United States Constitution grants Congress the power "To regulate Commerce • • • among the several states • • •." The first question, then, is whether the subject matter of P.L. 86-272 is interstate commerce and, therefore, subject to Congressional regula-

tion. The Louisiana Supreme Court and other supporters of plaintiff's position find or assume that it is. Proper determination of this issue rests squarely on interpretation of *Northwestern States—Stockham.*

In that decision the Court held that a fairly apportioned state net income tax was not an undue burden on interstate commerce. Earlier, in *Spector,* the Court had held that a corporation excise tax measured by net income was such undue burden on interstate commerce. These two beacon cases determine the course of interpretation. A proper resolution of the issues raised in the instant case requires determination of why the corporation excise tax in *Spector* was an undue burden on that commerce, while the corporation income tax in *Northwestern—Stockham* was not.

A tax is a burden *per se.* Any taxpayer knows this and of it this court takes judicial notice. The excise tax in *Spector* and the income tax in *Northwestern States—Stockham* both were burdens imposed on corporations engaged solely in interstate commerce within the taxing state.

In each of those cases the actual burden on commerce was substantially the same, a tax determined by net income. For instance, Oregon has both a corporation excise tax and the subject corporation net income tax. The rates and incidents of the two taxes are identical. A corporation qualified to do business in Oregon pays a certain amount of excise tax. The same corporation, if it were engaged solely in interstate commerce but not qualified to do business in Oregon, would pay the same amount of tax as corporation income tax. Yet if the corporation excise tax were applied to the corporation in the second situation, it would be an undue burden on interstate commerce under *Spector,* even though the same tax burden applied as a corporation net income tax in the

same situation would not be an undue burden on interstate commerce under *Northwestern States—Stockham.*

Because a tax is a burden and the burden of the same amount of tax was not undue in *Northwestern States—Stockham,* the undueness of the burden in *Spector* cannot arise from the extent of the burden, the weight of the tax. The logical and practical distinction between *Spector* and *Northwestern States—Stockham,* then, is that in the former the burden was imposed on interstate commerce, while in the latter it was not. Furthermore, the logical and practical conclusion is that, by its nature, a net income tax is not imposed on interstate commerce but upon the profits of a business after the proceeds of its commerce have left interstate commerce.

Northwestern States—Stockham supports this conclusion. In that case and *Spector,* the Court distinguished between a tax on interstate commerce itself and a tax on income derived from an interstate business (358 US at 464). This distinction is logical and realistic. It coincides conceptually with other distinctions which mark the boundaries between the fiscal sovereignty of the states and Congressional regulation of interstate commerce. The Supreme Court has long recognized that, at some point in the entire framework of our national business intercourse, interstate commerce must cease. For example, states can levy ad valorem taxes on goods flowing in interstate commerce after they have left the stream of interstate commerce. *Minnesota* v. *Blasius,* 290 US 1, 54 S Ct 34, 78 L ed 131 (1933); *Independent Warehouses, Inc. v. Scheele,* 331 US 70, 67 S Ct 1062, 91 L ed 1346 (1947).

The same theory must hold true as to the taxation of the moneys derived from the manufacture, transportation, and sale of those goods. Once moneys are anointed as interstate

commerce, Congress cannot forever sequester them as immune from local fiscal burdens. *Northwestern States—Stockham, supra.* At some point the proceeds of interstate commerce must be deemed to have left interstate commerce and returned to the less exalted position from which they have come. By distinguishing an excise tax from an income tax of the same fiscal burden, by distinguishing between interstate commerce and net income derived from interstate commerce, and by recognizing interstate commerce as a temporary condition and not an inherent, indissoluble state, *Northwestern States—Stockham* established the limit of interstate commerce. The Court recognized that, by the time proceeds derived from interstate commerce filter through the vicissitudes of expenses, depreciation, and the other proper accounting charges to become net profit, they cease to be within interstate commerce. Therefore, a state tax imposed upon the realization of that net income, not merely measured by that net income, is not a tax on interstate commerce and Congress cannot prohibit its exaction under the commerce clause.

Plaintiff and those in its support do not so interpret *Northwestern States—Stockham.* They say it holds that the net income tax is a burden on interstate commerce but not an undue burden. They claim to have interpreted the majority opinion as Mr. Justice Frankfurter did in his dissent. This is not accurate. Certainly, Mr. Justice Frankfurter thought the income tax an undue burden on interstate commerce; but he so held because he found the tax to be imposed directly on interstate commerce. Mr. Justice Whittaker, in his dissent in which Mr. Justice Frankfurter joined, acknowledged that the majority of the court did not so find, when he said (358 US at 483):

> "• • • There is no room to dispute these admitted facts. Yet, I believe, the Court does not squarely fact

them but veiledly treats the cases as though intrastate commerce were to some extent involved. * * *"

The transactions which earned the gross income admittedly were wholly interstate commerce. The majority opinion focused its attention, not on the nature of the commercial transactions creating the gross income, but on the nature of the tax on the net income. The tax and the realization of net income on which it was imposed, not the transactions, were of intrastate nature. A careful reading of the dissents shows that the dissenters disagreed with the majority concerning the continuance of interstate commerce through the application of expenses to gross income to arrive at net profit. If, as Mr. Justice Whittaker reasoned, the income received from transactions in interstate commerce does not lose its character as interstate commerce by the time that it becomes net profit or loss, only the determination of *Northwestern States—Stockham* which he and Justices Frankfurter and Stewart espoused was logically possible. A tax on such net income would have been a direct burden on interstate commerce and as fatally unconstitutional as was the identical burden in *Spector*. But this is not what the majority of the Court found and is not the result of that case.

This court's interpretation recognizes the distinction between state regulation prohibited as an undue burden on interstate commerce and state regulation permissible as a burden, but not an undue burden, on interstate commerce until Congress pre-empts the subject of regulation. See Hellerstein, "The Power of Congress to Restrict State Taxation of Interstate Commerce," 12 J. Taxation 302 (1960); and Hellerstein, "An Academician's View of State Taxation of Interstate Commerce," 16 Tax L. Rev. 159 (1961). But Congress cannot pre-empt state taxation because Congress does not lay taxes for the states. This

situation is not analogous to establishing utility rates or licensing engineers, when Congress acts under the commerce power after the state has taken similar action under the police power. *The Shreveport Rate Case,* (Houston, E. & W. T. R. Co. v. United States), 234 US 342, 34 S Ct. 533, 58 L ed 1341 (1914); *Smith* v. *Alabama,* 124 US 465, 8 S Ct 564, 31 L ed 508 (1888). In the case of rates or licensing for safety, Congress acts to supersede and replace state regulation with federal regulation. Both regulations burden interstate commerce. In the areas where state regulation is *ejusdem generis* with potential federal regulation burdens on interstate commerce are permitted until Congress acts. A state tax is not *ejusdem generis* with potential Congressional regulation under the commerce clause. It is not a burden which Congress might impose in the appropriate regulation of interstate commerce to promote public safety and welfare or to preserve the free flow of interstate commerce. It is not a burden permitted to the states until Congress acts, but rather, it is an undue burden on interstate commerce, if it is imposed on interstate commerce at all.

Furthermore, not only may Congress not pre-empt state taxation but, as pointed out above, the logical interpretation of *Northwestern States—Stockham* is that a state net income tax is not laid "on interstate commerce." Because the burden of a net income tax is not on that commerce which Congress may pre-empt or otherwise regulate, the distinction between prohibited undue burdens and due burdens permitted until Congress acts is inapplicable. Congress' power to prohibit state taxation terminates when the limits of interstate commerce are reached. The subject corporation income tax is imposed beyond that point.

This court has also considered the possible argument that P.L. 86-272 is a valid regulation of intrastate commerce

affecting interstate commerce under an extension of *Wickard v. Filburn*, 317 US 111, 63 S Ct 82, 87 L ed 122 (1942) and *The Shreveport Rate Case, supra.* The acquisition of net profit is not commerce *per se.* Despite the breadth of its application of the commerce clause, *Wickard v. Filburn, supra,* recognizes that every incident of business does not fall victim of commerce regulation (317 US at 120). Both *Wickard v. Filburn* and *The Shreveport Rate Case* allowed Congressional regulation to extend to intrastate commerce affecting interstate commerce in areas in which Congress had already affirmatively regulated interstate commerce, i.e. farm marketing and railroad rates. In the instant case, Congress seeks to prohibit a state tax, when it has no competence to impose state taxes or to pre-empt state taxation. Furthermore, it seeks to prohibit a state act, rather than extend to intrastate commerce its own affirmative regulation already in effect in interstate commerce. These are substantial distinctions. A failure to recognize them is fraught with dangerous consequences. To date, the defects of state taxes which burden the free flow of interstate commerce have caused their judicial prohibition. An attempt to justify, under *Wickard v. Filburn* and similar cases, Congressional prohibition of state taxes which do not burden interstate commerce is a substantial departure from the original scope of those decisions. This court believes such broadening of the doctrine of those cases is both unsupported by prior decisions and unwarranted by reason and logic.

Second Issue: Conflicting Fundamentals

The basic problem presented by the instant case, and foreseen in *Northwestern States—Stockham,* arises from the collision of two fundamental constitutional concepts. On the one hand, Congress has paramount, almost unlimited,

authority to regulate interstate commerce. It can regulate not only interstate commerce but also any aspect of intrastate commerce affecting interstate commerce. Congress has validly regulated the grain grown by an Ohio farmer as feed for his livestock and poultry because he sold that livestock and poultry in intrastate commerce in competition with interstate commerce and their sale affected the price of interstate products sold in the same market. *Wickard v. Filburn, supra.* It has validly regulated intrastate utility rates because those rates affected the rates charged in interstate commerce by the same or competing utilities. *The Shreveport Rate Case, supra.* As our economy becomes more and more closely integrated nationally, this Congressional power reaches into virtually every level of our economic life. Today, national concerns engaged in interstate commerce compete in the market place of every village and hamlet across the land. Almost every commercial transaction affects interstate commerce.

On the other hand, the Constitution is the compact of the several sovereign states. *New York v. United States,* 326 US 572, 595, 66 S Ct 310, 90 L ed 326 (1945). State sovereignty is limited only by the Federal Constitution as it is interpreted by the courts. The power to impose taxes unrestricted except by the consent of the governed is the essence of democratic sovereignty. "As it is not a kingdom without subjects, so he is not a King without revenues." *An Information Against Bates,* Lane's Reports 23, 145 English Reports (Exchequer) 267 (1606).

With the clash of these two concepts in the instant case, the victorious commerce clause reaches it Rubicon. Congressional regulation of interstate commerce will engulf state sovereignty, if Congress is able to prohibit an otherwise valid state net income tax either under the doctrine of *Wickard v. Filburn* and *The Shreveport Rate Case, supra,*

or because it is imposed on interstate commerce. If, as interstate commerce Congress can prohibit a state tax on net income derived from interstate commerce, then, Congress can prohibit all state taxation under its broad power to regulate intrastate affairs affecting interstate commerce. It can prohibit state taxes imposed on domestic corporations engaged in interstate commerce in competition with purely interstate corporations. It can prohibit state taxation of wholly intrastate businesses which compete with plaintiff and other interstate concerns. In fact, in our closely integrated, national business life, Congress can prohibit or render equitably impossible virtually all state taxation as regulation of either interstate commerce or commerce affecting interstate commerce, if it can prohibit net income taxes as a regulation of interstate commerce. The same result obtains if Congressional prohibition of state net income taxation is permitted under an extension of *Wickard v. Filburn, supra.* Stripped of the power to tax, the sovereignty of states is a hollow shell. An interpretation of the Federal Constitution which makes the imposition of otherwise constitutional state taxes subject to the by-your-leave of Congress does not merely weaken—it destroys—the entire federal concept of government. It reduces the states to the status of counties. This court is fully aware that our Federal Constitution is viable, variable, and adaptable to the changing times. Cardozo, *The Nature of the Judicial Process,* 17 (1921); Douglas, *We the Judges,* 433 (1956); Jackson, *The Struggle for Judicial Supremacy,* 174 (1941). But this court does not believe that its flexibility extends to the point of destroying the very essence of that compact.

The substantial defects of P.L. 86-272 lie in its prohibitory nature. Its prohibitory character distinguishes the point at which Congressional action is directed in P.L. 86-272 from the impact point of valid regulation of inter-

state commerce. The primary impact and effect of P.L. 86-272 are the prohibition of the exercise of sovereignty rather than a regulation of its exercise over commerce under Congress' jurisdiction. Furthermore, by prohibiting certain state taxation Congress creates an exemption or immunity, not merely a regulation. Exemptions and immunities from tax are not favored in the law because they shrink the base over which the tax burden is spread. *Oklahoma Tax Commission v. United States*, 319 US 598, 612, 63 S Ct 1284, 87 L ed 1612 (1942); *Staiger v. Holman*, 144 Or 67, 77, 23 P2d 917 (1933).

In *Freeman v. Hewit, supra* (329 US at 252), Mr. Justice Frankfurter pointed out that Congress has the commerce power in order that free trade may be maintained among the states. But to preserve the free flow of that commerce, Congress neither needs to, nor can it, destroy the sovereignty of states. To protect interstate commerce, Congress has many arrows in its quiver. When the one marked "prohibition of state taxation" is shattered on the rock of the Constitution, all its unused arrows are not thereby broken. That one arrow has merely missed the quarry Congress is hunting.

Congress may implement judicial decisions holding state taxation unconstitutional under the commerce clause. The Supreme Court has held that the states cannot discriminate against foreign corporations by imposing unequal taxation. *Welton v. Missouri*, 91 US 275, 23 L ed 347, (1876); *Best & Co. v. Maxwell*, 311 US 454, 61 S Ct 334, 85 L ed 275 (1940). In aid of the free flow of commerce, Congress may prohibit any unequal discriminatory taxation of interstate commerce. Congress may prohibit states collectively or severally from so taxing interstate commerce that more than one hundred per cent of the net income of a business

engaged in interstate commerce is subjected to tax. Such taxes in the aggregate are patently discriminatory and confiscatory. See *Gwin, White & Prince, Inc. v. Henneford*, 305 US 434, 59 S Ct 325, 83 L ed 272 (1939). Because some interstate allocation formulae are inherently valid but cause discrimination when used in conjunction with other valid formulae, Congress may adopt a uniform allocation formula and place the burden on any state departing from it to prove that the interaction of its formula with other formulae does not result in discriminatory or confiscatory taxation in the aggregate on more than one hundred per cent of the taxpayer's income. Congress may also regulate the forms and reports required of interstate commerce to the extent that such forms and reports increase the cost of interstate commerce, because an increase of the cost of doing business is a direct charge against gross income and clearly differs from a tax imposed after net income has been determined. *Northwestern States—Stockham, supra.* Such Congressional regulation, as distinguished from outright prohibition of a valid state tax, appears proper under the due process, equal protection, and commerce clauses.

This legislation would protect interstate commerce, from what Mr. Justice Frankfurter in his *Northwestern States—Stockham* dissent (358 US 474-7) found to be impediments of state taxation to the free flow of interstate commerce, without attacking the state's sovereign power to levy a valid tax at all. Congress would not be venturing beyond the protection of interstate commerce to directly attack state sovereignty. It would not be flatly prohibiting a state from imposing and collecting a tax upon net income from a taxpayer over whom the state has tax jurisdiction under the due process clause. It would not be attempting to extend interstate commerce regulation to prohibit a tax on a subject of tax, net profit, which lies beyond the purview of in-

terstate commerce and results from the interaction of economic factors so remotely related to interstate commerce that it is no longer a part of that commerce.

Second Issue: Fifth Amendment

Defendant also contends that, even if Congress can prohibit state net income taxation under the commerce clause, P.L. 86-272 violates the due process requirements of the Fifth Amendment of the Federal Constitution. P.L. 86-272 does not exempt all corporations engaged in interstate commerce which have a minimum nexus with a taxing state. Similarly, it discriminates against domestic corporations and qualified foreign corporations because of a purely formal distinction. Its effect and limitation are not fairly related to the objects which Congress seeks to serve. While there may be validity to this argument, this court has concluded that P.L. 86-272 is unconstitutional and, therefore, the due process question is moot.

Summary

In summation, this court finds: That plaintiff is immune from Oregon's Corporation Income Tax Act of 1955 under the terms of P.L. 86-272, if that statute is constitutional; but that P.L. 86-272 is unconstitutional. The net income tax which it prohibits is not a burden on interstate commerce because plaintiff's realization of net income properly apportionable to Oregon and the Oregon tax imposed thereon are not part of interstate commerce, but rather are beyond Congress' power to regulate that commerce.

Defendant shall prepare and present a decree affirming its assessment of Oregon corporation income tax against plaintiff for the calendar years 1955 through 1958 and denying plaintiff's claims for refund of tax paid on account of those years.

Dated this 24th day of April, 1964 at Salem, Oregon.

/s/ PETER M. GUNNAR
JUDGE

CERTIFICATE

I hereby certify that copies of the foregoing have been mailed to Chapman L. Sanford and Emmett E. Batson, Esqs., Attorneys for the Collector of Revenue of the State of Louisiana, addressed to 403 Capitol Annex Building, Baton Rouge 1, Louisiana; B. B. Taylor, Esq., Attorney for Appellee, addressed to 1100 Louisiana National Bank

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